FOUR LAND CASES

REPRINTED FROM

THE IRISH REPORTS,

AT THE REQUEST OF THE IRISH LAND COMMISSION,

BY

The Incorporated Council of Law Reporting for Ireland.

EDITED BY

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BARRISTER-AT-LAW.

DUBLIN:

PUBLISHED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND,

BY EDWARD PONSONBY,

116, GRAFTON STREET.

1900.

DUBLIN :

PRINTED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND,

At the University Press,

BY PONSONBY AND WELDRICK.

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Landlord and tenant—Land Law (Ireland) Acts, 1881-1896—*Land Commission—Jurisdiction—Fair rent—Power to refer to Court valuers—Report—Order whether bad on its face*—Certiorari—Mandamus.

R. and S., two tenants on the estate of Lord G., having had fair rents fixed by a Sub-Commission, the landlord applied to the Land Commission for a rehearing. Before the cases were reheard, the Land Commission sent down two valuers to inspect the holdings and report. The direction to the Court valuers instructed them to visit the holdings, and if they concurred with the schedule recorded by the Court, and their conclusion as to fair rents, report so on a form supplied; if they saw reason to differ substantially therefrom they were to report on another form, stating concisely, under the respective headings, the matters only as to which they differed and the consequent variations upon which their estimate of the fair rent of the holding had been arrived at. The Court valners reported, concurring with the schedule of the Sub-Commission. The appeals were heard by the Land Commission who received the evidence offered by landlord and tenants; but the Commission inspected and used the report of the Court valuers; and, in the result, confirmed the rents fixed by the Sub-Commission.

Held, that the Land Commission acted within their powers in making such reference to the Court valuers, and using their report.

The Land Commission made and filed a schedule prescribed by sect. 1 of the Land Law Act, 1896, in the form prescribed by the rules of January, 1897, Form No. 39, in which there was a statement under the heading of "Improvements made by the tenant" of deductions, with the sums allowed, for "Fences" and "Buildings" respectively, without further particularising these improvements; and a statement that the holding was subject to the Ulster Tenant-right Custom, but that no special deduction had been made when fixing a fair rent on account thereof:—

Held, that the order of the Land Commission was good on its face as sufficiently complying with sect. 1 of the Land Law Act, 1896.

(1) Before Lord Ashbourne, C., and Fitz Gibbon, Walker, and Holmes, L.JJ.

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APPEAL by the Earl of Gosford from an order of the Queen's Bench Division refusing to make absolute conditional orders for writs of *certiorari* to remove into that Court for the purpose of being quashed the orders made by the Land Commission on the 31st May, 1897, on the rehearing of the cases of Lord Gosford as landlord and William Rooney and Robert Shepherd as tenants, and for a *mandamus* to compel the Land Commission to hear and determine the said applications according to law. It appeared that several tenants on Lord Gosford's estate in the county of Armagh applied to the Land Commission to fix a second term of fair rents. In Rooney's case the tenant's former rent was £41 10*s.* which was reduced to £31 5*s.* by order of the Sub-Commission dated the 19th December, 1896. In the schedule filed in pursuance of section 1 of the Land Law Act, 1896, the Sub-Commission set out at No. 7 as improvements on the holding made wholly or partly by the tenant or at his cost:—

——	Capital Value.	Increased Letting Value due thereto.	Deduction from rent on account of each such improvement.
	£ *s.* *d.*	£ *s.* *d.*	£ *s.* *d.*
Fences, ...	72 0 0	3 12 0	3 12 0
Buildings, ...	350 0 0	17 10 0	17 10 0
Removing Boulder Stones over Farm, . .	30 0 0	1 10 0	1 10 0
422 perches of Drains, .	28 2 8	1 8 1	1 8 1
50 perches of Drains, .	3 6 8	0 3 4	0 3 4

Total deduction for Improvements, . £24 3*s.* 5*d.*

They also stated in the schedule as follows:—

8. State any other matters in relation to the holding that have been taken into account in fixing the fair rent.	This holding is subject to the Ulster Tenant-right Custom, but no special deduction has been made when fixing a fair rent on account thereof.

The landlord and the tenants each applied for a rehearing before the Land Commission, and before the case came on to be heard the Land Commission referred the schedule and order of the Sub-Commission to J. F. Bomford and T. M'Afee, two assistant Commissioners appointed by the Lord Lieutenant in pursuance of section 43 of the Land Law Act, 1881, to report thereon to the Land Commission. There was no order of the Land Commission directing the two valuers to make a report, but a form of directions was sent to them which stated:—"An appeal having been lodged in this case, you are to visit the holding; and 1, if you concur with the schedule recorded by the Court, and their conclusion as to fair rent, report so on Form A at foot of this page; 2, if you see reason to differ substantially therefrom, report on Form B within, stating concisely, under the respective headings the matter only as to which you differ, and the consequent variations upon which your estimate of the fair rent of the holding has been arrived at." Messrs. Bomford and M'Afee had previously acted as members of various Sub-Commissions in the county of Armagh. They visited and inspected the holdings, and reported that they concurred with the Sub-Commission. When the cases came on to be heard before the Land Commission, the solicitor for the landlord requested the Court that in considering the cases they should not take into consideration as evidence the order and schedule of the Sub-Commission or the Court valuers' report. The Court stated that they had already decided that these documents were evidence. The landlord's solicitor then asked them to state a case for the decision of the Court of Appeal of four questions which were formulated in writing, or in the alternative for leave to appeal:—

On the 31st May, 1897, Bewley, J., delivered judgment, refusing to state a case, and refusing leave to appeal, and confirming the rents fixed by the Sub-Commission in Rooney's case and Shepherd's case.

On a subsequent day conditional orders were made by the Queen's Bench Division on the application of Lord Gosford, for writs of *certiorari* to bring up and quash these orders on the following grounds:—

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1. That the order in the premises was made without and in excess of jurisdiction.

2. That the Land Commission upon the rehearing acted upon evidence not given upon oath or in open Court or in the presence of the parties.

3. That the said Land Commission prior to the said rehearing referred the subject-matter for their decision upon said rehearing to certain persons for a report to the said Land Commission, which report was afterwards used as evidence upon said rehearing. That the said subject-matter of their decision was not a matter that had arisen before the said Land Commission in determining any question relating to the holding, nor were said persons "an independent valuer."

4. That the matters referred to said persons include matters of law and other matters which the Land Commission were not authorised to refer to them.

5. That there was no rehearing as required by law.

6. That the said Land Commission received and acted upon the report as evidence upon the said rehearing without same being verified upon oath in open Court and in presence of the parties.

7. That the said order is bad upon the face of it, as it purports to be an affirmance on appeal, and not an independent order of the said Commission, ascertaining and determining the fair rent of the said holding upon said rehearing.

8. That the said Land Commission upon said rehearing neglected to ascertain and record in the form of a schedule the matters and things prescribed by the Land Law Act, 1896, section 1.

9. That in purporting to ascertain and record in a schedule the said matters and things the Land Commission upon rehearing received and acted upon evidence not given upon oath or in open Court or in the presence of the parties.

The conditional orders each included a *mandamus* requiring the Land Commission to hear the cases.

Mr. Seaver, one of the registrars of the Land Commission, made an affidavit to resist the motion in the Queen's Bench Division to make the conditional orders absolute. The material parts of this affidavit are as follows:—

"The hearing and decision of the said cases respectively, were, pursuant to the provisions of the Land Law (Ireland) Act, 1881, duly delegated to a Sub-Commission, who duly adjudicated upon the same in the ordinary and regular course, and pursuant to the 1st section of the Land Law (Ireland) Act, 1896, duly recorded in each case a schedule of the particulars of each holding, showing (amongst others) the acreable rents of each class of land upon the holdings and the particulars of and deductions for each improvement made by each tenant upon each holding."

He then gave an account of the subsequent steps in the matter, and stated:—

"It is the practice in the Land Commission Court to issue to any of the parties who apply for the same, before a rehearing, copies of the schedules returned by the Sub-Commissioners, and also copies of the Court valuers' report, on payment of a fee of one shilling for each; and, in these cases, same were duly supplied to the landlord's solicitors. Before the cases came on for rehearing, the Land Commission directed two of the most experienced agricultural experts attached to the Land Commission—namely, Mr. John F. Bomford and Mr. Thomas M'Afee—to inspect and value the said holdings, and to report upon same, and upon the correctness, or otherwise, of the particulars of same recorded, as aforesaid, by the Sub-Commission, the accuracy of which had been impugned, as aforesaid, by the said notice of rehearing. The said Mr. J. F. Bomford and Mr. T. M'Afee accordingly inspected each holding, and valued the same, and reported to the Land Commission that, after carefully examining each holding, they concurred with the fair rent fixed by the Sub-Commission and with the schedule of the particulars recorded by them.

"In directing the said J. F. Bomford and Thomas M'Afee to inspect and value each holding, and to report upon the particulars of same before the rehearing of the cases, the Land Commission acted in pursuance of the provisions of section 48, sub-sect. 4, of the Land Law (Ireland) Act, 1881, and in accordance with the usual and settled practice of the Land Commission since the year 1881. From time to time, since 1881, very many rehearings of fair rent cases upon the estate of Lord Gosford have been disposed of by the Land Commission, and the aforesaid practice of sending independent valuers to inspect and value the holdings, and to report upon all the particulars of same, before the rehearing of the cases, has been usually followed by the Land Commission. So far as I am aware, no objection to this practice was ever made by or on behalf of Lord Gosford until about a year ago, when his present land agent was appointed."

Further on, in paragraph 12 of the affidavit, Mr. Seaver said:—

"At the rehearing of the said cases, evidence was produced on both sides, and the Land Commissioners heard all the evidence offered on behalf of the landlord and tenants. In the case of Robert Shepherd the rent fixed by the

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Sub-Commission was £36; the fair rent estimated by Mr. William George Millar, who was produced on behalf of the tenant, was £26 2*s.* 3*d.*, and the fair rent estimated by Mr. Richard Allen, who was produced on behalf of the landlord, was £42 3*s.* In the case of William Rooney the rent fixed by the Sub-Commission was £31 5*s.*, the fair rent estimated by the said William George Millar on behalf of the tenant was £22 8*s.* 6*d.*, and the fair rent estimated by the said Richard Allen on behalf of the landlord was £34 9*s.* The existence of the Ulster Tenant-right Custom on Lord Gosford's estate was admitted at the rehearing. I am informed by the Land Commissioners, and believe that they duly considered all the evidence produced on both sides, and also the reports by the said John F. Bomford and Thomas M'Afee, and that, upon a full consideration of the said matters, and having regard to the evidence so given in Court, they came to the conclusion that the matters stated in the said schedules were in point of fact accurate; that the agreeable rent therein stated as applicable to the various classes of land was fair and reasonable; and that the amount at which the tenant's improvements were valued was fair and reasonable; and that the deductions made for improvements, save as varied by them, were just and proper deductions, and not too high on the one part, and not insufficient on the other part. Having come to the said conclusion, they agreed with and adopted as a result of the rehearing the amount of the fair rent which had been already arrived at as a fair rent by the Sub-Commission; and the schedules were thereupon prepared, in accordance with the statute, and the conclusion at which the Court arrived, to remain as a record of the matters therein stated.

"I am informed by the Land Commissioners, and believe that neither in the cases of the said tenants, Robert Shepherd and William Rooney, did they refer, nor in any other fair rent cases have they ever referred, to the Appeal valuers, the determination of any question of law or of mixed law and fact, or acted upon any statement in a report of Appeal valuers which might involve the decision of any question of law. What they have done is to direct the valuers to make a detailed valuation of the holding for the purposes of the report, and to ascertain whether the improvements had been in fact made, and if made what would be a reasonable allowance to be made in respect of them, and on this basis to report, for the information of the Court and convenience of the parties, their opinion as to what would be the amount of the fair rent; but they never referred to them the question whether the tenant was entitled in point of law to any reduction in respect of improvements. Save where the improvements are admitted to have been made by the tenant, or where some presumption exists that they have been made by him, the Land Commissioners on the rehearing of cases require, and in the cases of Shepherd and Rooney did require and had before them, evidence (on rehearing) of the making of any improvement allowed, entirely irrespective of any statement as to the improvements in the reports of the Appeal valuers; and the Court fixed the fair rent upon the full investigation of the case, including the evidence given before

them, and having regard to the report of the valuers on questions of fact and value as the report of an experienced and independent person who had inspected the holding."

The Queen's Bench Division (Sir P. O'Brien, L. C. J., Palles, C.B., and O'Brien and Johnson, JJ.) (1) having refused to make absolute the conditional orders, Lord Gosford appealed.

Ronan, Q. C., Campbell, Q. C., and *C. Murphy,* for the appellant:—

The Land Commission acted without, and in excess of, jurisdiction, by their delegation to the valuers, inasmuch as the section of the Act of 1881 contemplates a reference to a single valuer on a question arising in the course of the case, and not an antecedent reference to two valuers of all questions to be determined. The order of the Land Commission being based, as it was, on the report of the valuers, was made without jurisdiction.

The facts show that the order was not made by the Court, but that they referred the whole question to the valuers. They cannot delegate their authority, except so far as expressly authorised by statute, and the evidence must be taken by the Court itself upon oath. We submit, (*a*) they cannot refer a question of law to the valuers; (*b*) they cannot ask them what is the meaning of fair rent, because they must first tell them the standard, and as the members of the Land Commission differ, *inter se,* as to what that is, there is no standard: *Markey* v. *Lord Gosford* (2); (*c*) The valuers cannot administer an oath, and have no power to take evidence. The powers and duties of assessors or valuers have been defined: *Re Dawdy* (3); *Longman* v. *East* (4). A Court acting with an assessor is a different tribunal from a Court acting alone: 4 Inst. 70, 199. The matters referred to the valuers were partly questions of law and partly questions of fact; for example, the deductions to be made in consequence of each improvement: *Adams* v. *Dunseath* (5). The question of fair rent involves three things:

(1) 32 Ir. L. T. Rep. 27.
(2) 31 Ir. L. T. Rep. 97.
(3) 15 Q. B. D. 426.
(4) 3 C. P. D. 142.
(5) 10 L. R. Ir. 109.

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(*a*) What is a fair rent? (*b*) Is there an allowance to be made for occupation interest outside Ulster; and (*c*) assuming that there is to be an occupation interest, what allowance is to be made if the holding is subject to the Ulster Custom? The reference to the Court valuers being illegal and in excess of jurisdiction, there is power to quash, notwithstanding that *certiorari* is taken away: Paley on Convictions, 354.

Secondly, the order is bad on its face by reason of its failing to comply with the provisions of sect. 1 of the Act of 1896. That section enacts that no deductions shall be made, save those that are specified. The improvements must be stated so that they can be identified. Otherwise after another fifteen years the tenant may get credit for them again; merely stating "fences" and "buildings" is too indefinite. Then there is the statement that the holding is subject to the Ulster Custom, which must have been introduced as the basis of an unspecified deduction, again violating the Act, and therefore invalidating *ex facie* the orders complained of.

[The following cases were referred to:—*Overseers of Walsall* v. *L. & N. W. Railway Co.*(1); *Reg.* v. *Bolton* (2); *Re Listowel Fishery* (3); *Colonial Bank* v. *Willan* (4); *Reg.* v. *Cheltenham Commissioners* (5); *In re Sullivan* (6); *In re Heaphy* (7); *Ex parte Hopwood* (8); *In re Bailey* (9); *Lord Rossmore's Case* (10).]

The Rt. Hon. The Mac Dermot, Q. C., *Henry*, Q. C., and *D. M'Carthy Mahony*, for the Irish Land Commission:—

The question is a narrow one. The appellants must show:—1, a want of jurisdiction; 2, that the order is bad on its face; or 3, that there was such a bias in the tribunal that the principle *non est judex* applies.

The first of these is not open to the appellant, because a fair rent had been fixed before between these parties by the Land Commission, and this is the second term. The second ground of

(1) 4 App. Cas. 30.
(2) 1 Q. B. 66.
(3) I. R. 9 C. L. 59.
(4) L. R. 5 P. C. 417.
(5) 1 Q. B. 467.
(6) 22 L. R. Ir. 98.
(7) *Ibid.* 510.
(8) 15 Q. B. 121.
(9) 3 E. & B. 607.
(10) [1894] 2 I. R. 394.

objection is open; and three matters are suggested to support it: (*a*) that the particulars of the fences are not set out; (*b*) that the word "buildings" is not sufficient; and (*c*) the statement that the holding was subject to the Ulster Custom.

With respect to the "fences" and "buildings," it was always open to the landlord to give evidence as to the particulars of the fences and buildings; and the value of the fences is what was estimated by the landlord's valuer. The description "buildings" is sufficient: it is the same as would be given at a sale by auction. Nothing was taken off the rent for Ulster Tenant-right, and so that has not affected the question.

The reference to the valuers was made in pursuance of sect. 48; it has been constantly done, and if this makes the order bad, every fair rent fixed since 1881 is void. It is not a question of jurisdiction, but of misconduct. But the Land Commission did not use the report as the foundation of their judgment, but only as a legitimate element with other evidence in enabling them to come to a right conclusion.

[They referred to:—*Reg.* v. *Justices of Cambridgeshire* (1); *Reg.* v. *Justices of Carnarvonshire* (2); *Allcroft* v. *Bishop of London* (3); *Reg.* v. *Justices of West Yorkshire* (4).]

LORD ASHBOURNE, C.:— Feb. 12.

This appeal from the Queen's Bench Division raises some important questions in reference to the Land Commission; but although the arguments have necessarily been long, and involved the discussion of many interesting legal topics, some of which would be more pertinent on an appeal or case stated, the decision must turn upon a few clear and simple considerations.

The Land Commission is not in the technical sense a Superior Court; but it has jurisdiction to determine all questions of law and fact; its proceedings must be regarded as the judicial proceedings of a Court of Record; and in reference to it *certiorari* is taken away.

But notwithstanding that *certiorari* has been taken away, it is

(1) 1 Dow. & Ry. 325.
(2) 4 B. & Ald. 86.
(3) [1891] A. C. 666.
(4) 10 A. & E. 685.

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contended that that writ should issue in the present case on two grounds: first, because the order of the Land Commission is bad on its face; and second, because it is alleged there was an error in law in the action of the Land Commission in reference to the report of the valuers.

These points are quite distinct, and must be dealt with separately. The first turns upon what is called "The Pink Schedule," which is prescribed by the first section of the Irish Land Act of 1896. This Court in the case of *Cope* v. *Cunningham* (1) laid down, with absolute clearness, that the enactment applied to the Head Land Commission itself, as well as to the County Courts and Sub-Commissions; and that is not a position which it is for a moment sought to question. In that case, acting under their then impression as to the law, the Head Land Commission had omitted altogether to fill the Pink Schedule. They had no Pink Schedule at all; and we were all clearly of opinion that the enactment relating to that document plainly applied to them, and that it was their duty to comply with it. The present case, of course, differs entirely from *Cope* v. *Cunningham* (1). The order of the Land Commission is accompanied by a Pink Schedule; and the allegation of the appellant is that their order is bad on its face, in consequence of the way that schedule has been filled. The objections taken may be very shortly stated, and are two in number: first, it is alleged that "the nature and character" of two of the improvements, "Fences, £72; Buildings, £350," are not adequately described. It is alleged that the length, situation, and character of the fences are not stated, and that the description of the buildings is not sufficiently full. I do not say at all that the description of fences and buildings might not be made more precise; but I am clearly of opinion that on this application we could not hold the objections well-founded. Second, it is urged that the schedule states under the heading of "such other matters in relation to the holding as may have been taken into account in fixing the fair rent thereof," that "the holding is subject to the Ulster Tenant-right Custom," but that no sum is stated to have been deducted in respect of it. If a deduction had in fact been

(1) [1897] 2 I. R. 467.

made from what would otherwise have been the fair rent, on account of the Ulster Tenant-right Custom, it should naturally have been specified; but it may have been considered without any deduction being made. There are many usages comprised in the general description of "the Ulster Tenant-right Custom," and there is nothing in the schedule to compel us to infer that under the usage to which this holding was subject, taking it fully into consideration, there was anything to justify any deductions in addition to those already specifically stated. In my opinion, therefore, there is nothing to support the first objection that the order is bad on its face.

Holding then the order to be good on its face, it remains to consider the second objection, alleging error in reference to the valuers' report. Having regard to the power and jurisdiction of the Land Commission, mere mistakes in law on their part would not support this application. From the mass of cases showing this, it will suffice to refer to the case in the House of Lords of *The Overseers of the Poor of Walsall* v. *London and North-Western Railway Company* (1). But the powerful argument addressed to us by Mr. Ronan and Mr. Campbell, contended that the action of the Land Commission in reference to the valuers' report was no mere error of law. They assert that the Land Commission exceeded their jurisdiction in the wide reference they made to the valuers, that the valuers' report was therefore unauthorised, and that its consideration by the Land Commission was calculated to cause "a real bias" in their mind, and therefore destroyed their judicial competency.

The express statutable power of the Land Commission to employ independent valuers to make a report to them is found in section 48, sub-sect. 4, of the Irish Land Law Act, 1881. That section authorises the Land Commission, determining any question relating to a holding, to direct an independent valuer to report to them on any matter they may desire to refer to him, and if they think fit to adopt his report, and they have further authority to direct that the valuer should accompany his report with a statement of all such "facts or circumstances as may be

(1) 4 App. Cas. 30.

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required" to enable the Land Commission to form their judgment on the subject-matter of the report.

In the present case it is argued that there was no order of reference, and in any event no power to refer to more than one valuer. But the Land Commission followed in the present case the practice they had maintained since 1881; and it would be unreasonable now to allow this practice to be questioned when the valuers, set in motion by the machinery of the Land Commission, duly reported to the Land Commission. The two valuers started in their work by the Land Commission were asked to report—1, whether they concurred with the schedule recorded by the Sub-Commissioners, and also with "their conclusion as to the fair rent"; or 2, if they saw reason to differ substantially, then to report the matters as to which they differed, and the consequent variations in the fair rent. These being wide questions, involving practically the entire schedule of the Sub-Commissioners and their conclusion as to the fair rent, were referred to the valuers for their report. The report of the valuers was sent to each of the parties from the Land Commission, accompanied by a perfectly fair and proper letter, saying that the Commission considered both parties should be informed of the result, and that it rested with the parties to prosecute, or withdraw, their notices for rehearing, and that they were not bound to accept the Court valuers' estimate of the rent. The report was considered and presumably acted on, and used by the Land Commission as they thought fit. The appellant contends that the action of the Land Commission in relation to this report involves such error as to vitiate their order—that they had no authority to make such a reference, or act on such a report. The argument shortly is, that asking for and using such a report gave them a "real bias," and took away their judicial independence and competency, and the judgment of Lord Blackburn in the case of *Reg.* v. *Rand* (1), and other authorities have been referred to in order to establish the contention. It is only fair, however, to bear in mind the explanation of their motives and action in reference to this report given on behalf of the Land

(1) L. R. 1 Q. B. 230.

Commission by their officer, Mr. Seaver. The following statements from his affidavit are entitled to notice:—"In directing the said J. F. Bomford and T. M'Afee to inspect and value each holding and to report upon the particulars of same before the rehearing of the cases, the Land Commission acted in pursuance of the provisions of section 48, sub-sect. 4, of the Land Law (Ireland) Act, 1881, and in accordance with the usual and settled practice of the Land Commission since the year 1881. . . . At the rehearing of the said cases evidence was produced on both sides, and the Land Commissioners heard all the evidence offered on behalf of the landlord and tenants. . . . I am informed by the Land Commissioners, and believe, that they duly considered all the evidence produced on both sides, and also the reports of the said J. F. Bomford and Thomas M'Afee, and that upon a full consideration of the said matters, and having regard to the evidence so given in Court, they came to the conclusion that the matters stated in the said schedule were in point of fact accurate, that the agreeable rent therein stated as applicable to the various classes of land was fair and reasonable, and that the amount at which the tenants' improvements were valued was fair and reasonable, and that the deductions for improvements, save as varied by them, were just and proper deductions, and not too high on the one part, and not insufficient on the other part. Having come to the said conclusion, they agreed with and adopted, as a result of the rehearing, the amount of the fair rent, which had been already arrived at as a fair rent by the Sub-Commission, and the schedules were thereupon prepared in accordance with the statute; and the conclusion at which the Court arrived remains as a record of the matters stated. I am informed by the Land Commissioners and believe that neither in the cases of the said tenants, Robert Shepherd and William Rooney, did they refer, nor in any other fair rent case have they ever referred, to the Appeal valuers the determination of any question of law, or of mixed law and fact, or acted upon any statement in a report of Appeal valuers, which might involve the decision of any question of law. What they have done is to direct the valuers to make a detailed valuation of the holding for the purposes of the report and to ascertain whether the improvements had been made in fact, and, if made, what would

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be a reasonable allowance to be made in respect of them, and on this basis to report, for the information of the Court and convenience of the parties, their opinion as to what would be the amount of the fair rent: but they never referred to them the question whether the tenant was entitled in point of law to any deduction in respect of improvements."

This affidavit, carefully framed and deliberately put forward by the Land Commission, states what they intended in asking for a report, and what they did on the report; and its whole structure conveys that their order was their own independent judicial act, quite free from the vice of "real bias" imputed by the appellant. I am by no means prepared to concur in the assumption that the reference was unauthorised when rightly understood. The sub-section (4) of section 48 is extremely wide, as to the matters, facts, and circumstances, which the Land Commission can refer to a valuer, and if the word "valuer" is taken as the key, then the reference only asks for such report as a valuer could make in reference to the matters referred. He is not asked to report on any matters of law connected with the schedule or with the fair rent; but there is ample scope for a perfectly legitimate report from him as a valuer on the facts.

But even assuming that the reference to the valuers was too wide, not sufficiently guarded in its terms, and that more care might have been taken to direct them not to wander into disputable regions of mixed questions of law and fact, would that carry the contention of the appellant? The Land Commission, as I have already said, is a Court of Record, with full jurisdiction to determine all questions of law and fact, with the writ of *certiorari* taken away, and if in the *bona fide* exercise of their powers they make a mistake in the extent and terms of a reference, they are expressly authorised by statute to make, that is then a mistake in law, which any tribunal might honestly make, and cannot be reached by *certiorari*. If a report, open to objection by reason of its undue width, was sent in to the Land Commission, I infer, from the affidavit of Mr. Seaver, that the Land Commissioners would feel bound to disregard anything in it which appeared to intrude into questions of law or mixed questions of law and fact, and exercise their own independent judgment in

arriving at a conclusion, and framing their order. Here the Land Commission appears to have acted in the belief that they were, and with the intention that they would keep, within the statute; and I am clearly of opinion, for the reasons I have stated, that on this second ground relied on by the appellant no case whatever has been made for the writ of *certiorari* asked for, and that no jurisdiction to issue it has on the facts been shown.

It is unnecessary to add anything on the application for a *mandamus* to the Land Commission. Once the order already made is held to be good on its face, and that it cannot be quashed, it is manifest that the Land Commission could not be ordered to hear and determine, as if that order was not in existence.

In my opinion the order of the Queen's Bench was right and should be affirmed. We have carefully considered the question of costs, which has caused us some difficulty, but, considering that the effect of the appeal will be to settle the practice of a great department, we will allow the parties to bear their own costs.

FITZ GIBBON, L.J.:—

I concur with the Lord Chancellor, and with the Court of Queen's Bench, that the cause shown against the conditional order for a *certiorari* and *mandamus* must be allowed. But although thus concurring in the conclusion of the Queen's Bench, the grounds upon which my judgment rests differ materially from those that appear in the judgments of the Court below; and, in its effect on the practice, and on the principles which ought to regulate the practice, of the Land Commission, the decision of this Court is so far different from that of the Court below as to justify the conclusion that the appeal has been useful in the settlement of those principles and that practice. There is also, in the judgment of my Lord Chief Baron, a hint at a very large question, which it is not necessary for us on the present occasion to decide, but upon which I entertain the gravest doubt that the language of his judgment could be adopted without introducing an innovation into the law, as regards the principles that govern the control of the Court of Queen's Bench over an inferior Court. As at present advised, I am obliged to guard myself entirely against basing anything upon any immunity, or supposed immunity, of the

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inferior Court from being controlled by *certiorari*, based on its being endowed, or supposed to be endowed, with power to enlarge its own jurisdiction by making a mistake in point of law, or by deciding that it has a jurisdiction which it really has not.

I propose to arrange the observations which I wish to make under two heads, because it appears to me that the questions at issue are reducible to two. First—Is there on the face of this order such a manifest want or excess of jurisdiction as to make it examinable and bad? Secondly—Has there been, in the course of the procedure, any conduct on the part of the Court, or any proceeding, indicating a want or excess of jurisdiction, capable of being shown *aliunde*, such as will enable us to say that the order is bad?

Upon the first question, it is remarkable, as observed by the Lord Chief Baron, that there is upon the face of the order itself no express incorporation of the schedule upon which the whole question turns, with the order fixing the fair rent. The Lord Chief Baron got over that difficulty, which was purely technical, by the signature of the Registrar at the bottom of the schedule, as that signature purported to be attached "by order of the Court." But, looking at the statute under which the schedule is framed, it appears to me that we may find a more satisfactory answer to the suggestion that, as regards incorporation, the order and the schedule taken together are objectionable in form. The subject-matter of the order of the Court is the fixing of a fair rent; to the process of fixing that fair rent the Act of 1896, sect. 1, has attached the obligation of ascertaining the fair rent in a certain way, and of afterwards recording it in a schedule. Subsect. 2 contains a curious provision that nothing contained in the first schedule shall affect the construction of any other portion of the Act, but the first schedule gives a statutory form, which is headed, "Form of schedule for recording particulars of holding taken into consideration in fixing the judicial rent," and this statutory precedent identifies the schedule with the order in the very same way in which the schedule is identified with the order in the present case—namely, by referring to the county, to the record number, and to the names of the landlord and tenant, and by the identity of the date. Therefore, so far as the form of the

paper is concerned, the order of the Land Commission fixing the fair rent, and accompanying the fixing of that fair rent by a schedule, purports to be a discharge of their duty under the Act of 1896, sect. 1, and is sufficient.

That being so, the first objection to the contents of the order is that, as to fences and buildings, it does not sufficiently detail the matters which the Act directs to be recorded. I concede to Mr. Ronan's argument that one object—if not the main object—of recording the particulars of the improvements that were made the subject matter of deduction, or that were credited to the landlord, may have been to make the record available for future use as evidence. But upon his observations with respect to the effect upon the duty of the Land Commission under the statute of our decision in *Cope* v. *Cunningham* (1), I desire to say a few words. The Chief Baron, in his judgment in that case, says that he thinks it clear that the intention of the Legislature was that the Court should, before it determines, and as incidental to determining the fair rent, ascertain the particulars in section 1, and that the fair rent of the holding should be ascertained having regard to such particulars, which are essential ingredients in, and the basis of, the ascertainment of the fair rent. He then adds:—"It is impossible that there can be any difficulty in recording them, if the rent has been fixed in pursuance of the directions of the sub-section. The rent cannot be ascertained without each of these particulars being present to, and operating upon, the mind of the Court in ascertaining it, and, for this reason, I am of opinion that the omission of the schedule is not a mere irregularity, but that *it goes to the jurisdiction* of the Court to ascertain the fair rent of the holding." I stop there for a moment, though three lines are added upon which I wish afterwards to say a word. Upon that statement of the law by the Lord Chief Baron I venture to explain the considerations which seem to me to give vital importance to the Lord Chief Baron's opinion, which I also entertain, that compliance with the section is essential to the jurisdiction of the Land Commission to fix a fair rent at all. It appeared to me then, and it appears to me still, that the process of ascertaining the fair rent

(1) [1897] 2 I. R. 467.

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which is prescribed, is the process which is to be recorded in the schedule; the recording of it afterwards in the schedule is the prescribed mode of showing that it has been gone through, and unless the prescribed process has been gone through, and has been recorded as prescribed, it was the judgment of the Lord Chief Baron, and it was mine, and I don't understand it to be now questioned, that the Land Commission would not have satisfied its jurisdiction, and if it appeared on the face of its order that it had not done its prescribed duty the order would be bad. When the statute states that the process is to be recorded in the form of a schedule, it follows that unless it is recorded in the form of a schedule, it will appear that the rent has not been ascertained in the way directed, and therefore it will appear on the face of the order that the section has not been obeyed, and the order will be bad. But the Lord Chief Baron added these words:—"In my opinion an order purporting to fix a fair rent in a case in which *the required particulars are not recorded* in the schedule, is null and void, and made without jurisdiction." I believe that the Lord Chief Baron never intended to convey, and when I concurred with him I certainly did not understand him to convey, that a failure to record in the schedule all and every one of the required particulars would make the order null and void. What he was speaking of, and what I was thinking of, was a case in which there was no schedule at all, and in which there was, therefore, disobedience of the statute which directed that the schedule should be there, and in which the absence of the schedule showed, in the way I have already pointed out, that the rent had not been ascertained in the way directed by the statute, and therefore had been ascertained without jurisdiction. If we turn to the statute itself, the distinction will appear between the particulars which are to be set out in the schedule, and the process of ascertainment which, in its essentials and as a whole, the schedule must record as having taken place. There are a great many matters which are expressly directed to be considered by the Court in fixing a fair rent which will never appear in the schedule at all, in the shape of deductions. The first sum that is to be put down in the schedule is the annual sum which should be the fair rent, on the assumption that all the improvements—I will say for shortness—belonged to the landlord.

Secondly, the condition as to cultivation, deterioration or otherwise, of the holding and the buildings thereof. This recording of the condition of the holding is a mere writing down of certain things which were there to be seen at the time, in order that, on a future occasion, one may be able to know, when revising the rent, what the condition of these temporary matters had been at some previous time when the rent was fixed, but that condition never can appear as an item iu moneys numbered in the schedule, or in the prescribed calculation of the fair rent. Then follow the improvements belonging to the tenant, and a number of particulars regarding them are directed to be recorded, including "the nature, character, and present capital value thereof, and the increased value due thereto." Let me ask whether those general words, "nature, character, and present capital value," make it necessary to the jurisdiction, or compulsory, to identify every fence, building, and drain that has been taken into account? With all respect it appears to me that they certainly do not. Again—not interpreting the section by the schedule, but looking to the schedule as to a marginal note, as an indication of what the Legislature was about when drawing the section—I find, amongst other things, the question—"Does the holding require to be drained, and, if so, how much of the holding? and mark the part requiring drainage on map by thin parallel black lines." This schedule to the Act was afterwards modified, and the Land Commission framed another instead of it, as they had power to do, but I am entitled to refer to it to show that the words "nature and character of improvements," when used by the framers of the Act, did not carry with them any obligation or idea of identifying every fence and every drain which might appear upon the schedule to have been taken into account in fixing the rent. The Commissioners must purport to investigate these things, to find out their present value, to make what allowance they think right with regard to them, and when they have done all this, they must show that they have done so; but there is an entire difference, as it occurs to me, between showing by the absence of the schedule that they have not gone through the process which the Act directs, and, after having gone through the process, having merely failed to record every step and item in it with full particularity, or with the particularity which might be desirable, or

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even necessary, for the purpose of preserving evidence. I must emphatically disclaim for myself, and I have no reason to suppose that I am not justified in disclaiming for the Chief Baron's judgment also, any intention to invert the order of time so completely as was suggested in that part of Mr. Ronan's argument in which he cited our judgments to show that any appreciable defect in the schedule, however trivial, would nullify the order ascertaining the fair rent, although the schedule was not prepared until after the ascertainment of the rent, and only purported to record how the rent had been ascertained. It appears to me that it is only where the schedule shows on its face that the ascertainment was not such an ascertainment as the Act prescribes, or where the absence of a schedule shows that the statutory duty was not performed, that the schedule "would go to the jurisdiction," and make the order bad on the face of it.

The second objection that was made upon the face of this order, as to the "Ulster Custom," appears to me to be much more serious, because it charges the Land Commission with having violated an express provision of the statute. Sub-sect. 9 provides that in assessing the fair rent of any holding, no deduction shall be made except such deductions as shall be specified and accounted for in the schedule, and are in accordance with the provisions of the Land Law Acts. I do not refer to the difference between the schedule of the Sub-Commission and the schedule of the Head Commission, because we have now to decide whether the order of the Head Commission is bad upon its face, and we cannot make it better or worse by referring to another document. "State any other matters in relation to the holding that have been taken into account in fixing the fair rent thereof." Answer: "The holding is subject to the Ulster Tenant-right Custom." It is strongly pressed, especially when we look at the form of the previous answer, from which this one varied, that this amounts to a statement that the Ulster Tenant-right Custom was taken into account for the purpose, and with the effect, of making a deduction from the fair rent. I believe that all the Judges of the Queen's Bench were of opinion, and so far as I know all the Judges here are of opinion, that if it appeared upon the face of this schedule that anything had been deducted in fixing the fair rent, which was not

shown upon the schedule, the schedule would be bad, and that it would follow that the order, of which the schedule is an integral part, was bad also, upon the ground that it failed to comply with the express provision of sub-sect. 9. But I cannot read these words "the holding is subject to the Ulster Tenant-right Custom" as necessarily intending any deduction from the fair rent. In the first place, if they could be divorced from the printed question, or if they were even "separated from it by a black line"—to use a quotation from the schedule itself—the observations would be not only harmless but legitimate, because from "the circumstances of the holding" which the Commissioners are bound to consider in fixing the fair rent, the fact that it is subject to the Ulster Tenant-right Custom cannot be excluded. It may have—it is not for me to say whether it has or not, but in the opinion of those who know more about it than I do, who know nothing, it may have—a direct and legal bearing upon the presumption as to improvements. It apparently is a circumstance of the holding which is to be considered, and may therefore be taken into account in fixing the fair rent. But my present point is this—the note here cannot make this order bad upon the face of it, unless the fact that the holding was subject to the Ulster Tenant-right Custom had led to a deduction being made, which deduction was not specified in the schedule. The portion of the section which is said to be violated is sub-section 9. But the answer is this—there are many matters in relation to the holding which are to be taken into account in the schedule, but which are not, or may not be, the subject of deduction. One of these I have already referred to—the condition as to cultivation, deterioration or otherwise. Another of them is—"(*e*) the improvements made wholly or partly by, or at the cost of, or acquired by, the landlord"; and we have also—"such other matters in relation to the holding as have been taken into account in fixing the fair rent thereof." Some of these matters may increase the letting value, and consequently the fair rent; others may not. I am not certain that it has not even been said that "fair rents" are higher in Ulster than elsewhere. It occurs to me, therefore, that as the note does not necessarily lead to a deduction, we are not at liberty to assume that a deduction was made. Johnson, J., was very doubtful indeed—in fact so doubtful

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as almost to express an opinion to the contrary—that this order could be maintained in consequence of this note. But he truly says that, in dealing with such an order on *certiorari*, "no intendment can be made against it," and we do make an intendment against it, if we hold this note to intend and mean that the Ulster Tenant-right Custom was a matter in relation to the holding which was taken into account for the purpose of making a deduction. If this had been done, the deduction ought to have been shown, and the order would be bad because it is not shown; but, without intending against the order, I cannot assume that an unspecified deduction was made, and the order is therefore good upon the face of it.

It is most undesirable that we should go into the question, except so far as is absolutely necessary, of the definition of a fair rent. The first item in the schedule to be framed under the Act of 1896, s. 1, is "the annual sum which should be the *fair rent* of the holding, on the assumption that all improvements thereon were made or acquired by the landlord." In determining the sum which should be the fair rent of the holding upon that assumption, it appears clear that the Land Commission is still to exercise the same jurisdiction which was conferred upon it by the Act of 1881, s. 8, and that the sum which had been called "the gross fair rent" is still to be ascertained and determined by the Land Commission under the Act of 1896 as under the Act of 1881, by a similar process and in a similar manner, and that all that the Act of 1896 has done is to require that any deductions made from that sum shall be specified, and that certain of the materials used in ascertaining it shall be stated. Further light is thrown upon the intention of the Act of 1896 by referring to the Act of 1881, sect. 8, sub-sect. 9. "No rent shall be allowed or made payable in any proceedings under this Act in respect of improvements made by the tenant or his predecessors, and for which, in the opinion of the Court, the tenant shall not have been paid." The provisions of the Act of 1896, with regard to specifying improvements and the deductions allowed for them, appear to be to a great extent—I don't say entirely—pointed to identifying and recording any disallowances of rent that may have been made in respect of improvements which, under this sub-section of the former Act, would have been left unspecified.

We have been referred to the judgments in the case of *Markey* v. *Gosford* (1), and I have gone through them with great care, upon this question of fair rent. I desire to leave it in the same position in which the Act of Parliament placed it, by nowhere indicating any intention of defining a fair rent. But it appears impossible to say, for the reasons indicated by those judgments, that the fact that a holding is under the Ulster Custom necessarily involves a deduction from what would otherwise be ascertained as the fair rent. Furthermore, it appears to me that, if we read the judgments with care, it is impossible to understand the difference between Bewley, J., and the other members of the Commission, with regard to what they called "occupation interest," unless those other members, when they said that what was called "competition value" was to be excluded, and yet that the fair rent was to be ascertained upon the assumption that the land was in the landlord's hands, meant that it was to be taken as being in the landlord's hands for the purpose of working it as a holding, and not in the landlord's hands for the purpose of putting it up to competition, and so getting the "competition value" for it. They really seem to have desired to get, as it were, the intrinsic value as the foundation of the fair rent. If so, as is well pointed out in the Queen's Bench, especially in the judgment of O'Brien, J., we are not intending against the truth, when we do intend, upon the face of this order, and in its favour, that no deduction was made here from what would otherwise be the fair rent of this holding, on the ground that it was subject to the Ulster Custom. That being so, both in reality and in form, according to its fair intendment, we cannot hold the order to be bad.

The next question comes to one of jurisdiction, and two objections were made by Mr. Ronan, which were on narrower grounds, and which I shall deal with first. His first objection was that the power to refer under section 48, sub-section 4, being a judicial power, was a power to be exercised by a proper order, and that there was no order in this case. That it is a judicial power no one can doubt. "In determining any question relating to the holding, the Commission may direct an independent valuer to report his

(1) 31 I. L. T. R. 97.

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opinion on any matter the Commission may desire to refer to such valuer." There must be a desire to refer, and there must be a direction to refer, and there was nothing in the nature of an order made up in the particular case, referring anything to Messrs. Bomford and M'Afee. There is also no general order making such a reference in all cases, at least in the form in which that term is usually understood. But I am bound to say that I cannot adopt the view of the Lord Chief Baron as to how this reference came, in fact, to be made. What he says, is:—"All these questions, involving, as they do, many of the most difficult and as yet undetermined questions that have arisen upon the interpretation of this most difficult Act of Parliament, are *by the administrative act of some unknown clerk* referred to the consideration of two gentlemen, who, no doubt, are skilled valuers, but who do not pretend to have any legal knowledge." The mode in which this reference really took place is officially stated by Bewley, J., in the observations which he made on the 7th December last, reported 31 I.L.T., p. 575, when he was announcing a change in the practice, as to which I shall have to say a word before I am done. He said that this practice had been from the beginning. Before the rehearing in *Adams* v. *Dunseath* (1), the Court availing itself of the provisions of section 37, sub-section 6, or section 48, sub-sect. 4, had the holding inspected by two valuers. On the 17th January, 1882, O'Hagan, J., in a judgment of great weight, in which Mr. Commissioner Litton concurred, held that the parties should have an opportunity of seeing the reports. It was then decided that the report of the valuers should be given to the parties. While O'Hagan, J., was still Judicial Commissioner, and after some years, the form of the report of the Court valuer developed into a more elaborate document than it originally was, and information was asked on twelve different subject-matters relative to the ascertainment of the fair rent. That system went on for nine or ten years, and he said that it was impugned by the order of the Queen's Bench in this case. As to the "impugning" of it, I shall speak afterwards. I am now upon what it was before it was impugned, and what the reference was in the present case. In my

(1) 10 L. R. Ir. 109.

opinion the paper handed to the valuers in this case indicates that it is itself in the nature of a judicial reference. "An appeal having been lodged in this case, you are to visit the holding; and (1.) If you concur with the schedule recorded by the Court, and their conclusion as to fair rent, report so on form A at foot of this page. (2.) If you see reason to differ substantially therefrom, report on form B within, stating concisely, under the respective headings, the matter only as to which you differ, and the consequent variations upon which your estimate of the fair rent of the holding has been arrived at." These directions were given to the valuers not by any mere administrative act of an unknown clerk, but in accordance with the long settled practice of the Court, and as an invariable preparatory step towards the rehearing of the case by the Land Commission. But I attach most importance, in dealing with the fact first, and the character afterwards, of this reference, to the official notice given by the Land Commission to the parties in March, 1897, without any day of the month at the top of it. The notice of rehearing was given on February 8; the Court valuers' report is dated March 15, so that there was no loss of time, and by this paper, headed March, 1897, which therefore must have been sent almost immediately after, the following communication was made to both parties:—"I am directed by the Irish Land Commission to inform you that for the rehearing by them of the above case, as required by the notice served for that purpose, *they have caused a valuation to be made of the holding.*" Though they say—"The parties are not bound to accept the Court valuers' estimate of the rent," they certainly do give them something amounting to a rather strong intimation that there is not much use in going on with the appeal in the face of the report. But that is a distinct notice that there had been a direction followed by a report; and having regard to the practice of the Commission from the commencement, I hold that we are bound, especially on an application such as this, to intend in favour of this report that it was furnished in accordance with a judicial direction; and we must come to the question whether that direction, and the reference which it made, were or were not authorised by the statute.

But Mr. Ronan made another preliminary point. He said:—

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"The two gentlemen to whom you sent this direction were not independent valuers," because an "independent valuer" must mean some person who had not been so concerned in the business as these two gentlemen were. Their only previous concern in the business appears upon the affidavits to have been that they had acted as Sub-Commissioners in valuing certain other estates in the same county, and that they were appointed by the Land Commission. Having acted before in another capacity, in valuing holdings, cannot make a man cease to be independent. Experience of some sort must be attributed to every man who purports to act as a valuer; and, if he is to be an expert at all, I cannot see that having acted in an official capacity in another department, in itself prevents a man from being independent. But the second point might require a further answer, namely, that they were not independent, because they were dependent upon the Land Commission for their appointment, and that the words "independent valuer" meant some valuer who had not had anything previously to do either with the parties or with the Commission. A reference to another section seems to me to answer that point. Section 48, sub-sect. 4, is in identical terms with section 37, sub-sect. 6, which enables similar assistance to be obtained by the County Court; and in the Act of 1887, section 32, I find that for aiding the County Court Judges in performing the duties imposed on them, "the Land Commission may from time to time, but subject to the approval of the Lord Lieutenant, nominate *independent valuers*, to some one of whom each County Court Judge may, whenever necessary, refer any question for report." That appears to me to be a distinct statutory statement that a person nominated by the Land Commission approved by the Lord Lieutenant, and paid by the Treasury, may be an "independent valuer" within the meaning of the Land Acts.

But yet another point was made—and no point was omitted—that there was no power to refer to two; and that only one was authorised. I should have had great difficulty about that, if the question was now raised for the first time, especially because the words "to some one of whom" are used in the case of the County Court, and "independent valuer" in the singular is the word with which we have to deal. Analogy also is against the extension

to two; and the instances are many in which Mr. Ronan's industry has found the phrase "one or more" used, even up to the House of Lords itself, in enactments providing for calling in assessors. But upon *certiorari*, after the practice that has gone on for so many years, and after the parties themselves had got notice that, in accordance with that practice, two independent valuers had been here asked to report in place of one, and where the objection is made not to *the two*, but to *any* referee, I cannot possibly hold that doubling the valuers, of itself, makes the reference bad.

Therefore, treating this reference as being judicially made to independent valuers, we have next to see what is the effect of it. Upon that point I am bound to say that I differ, with all respect, from a great deal that was said by two, at least, of the Judges in the Court below, and I must therefore try to express my own opinion very clearly. "In determining any question relating to a holding" the Commission "may direct an independent valuer to report . . . his opinion . . . on any matter the Commission may desire to refer to such valuer, such report to be accompanied with a statement, if so directed, of all such facts and circumstances as may be required for the purpose of enabling the Commission to form a judgment *as to the subject-matter of such report*." Then the Commission "may, or may not, as it thinks fit, adopt the report of the valuer." In my opinion the scope of the power to refer under that section is almost, if not altogether, unlimited, that is to say, its scope as regards what opinions may be asked for, upon, or about. The idea may have been that such references would take place during the course of the hearing. But no one can fail to see that if the course of waiting until the hearing before making a reference of this kind had been taken, the necessary result would be the duplication of hearings and the multiplication of expense. At the first hearing, the only thing to be done would be to make a reference to a valuer. There would have been a formal and a useless hearing, like what we used to have under the 15th sect. of the Chancery Procedure Act, 1850, and the second and real hearing could not come on until after the valuer's report had been got. The universal practice of the Land Commission, stated to have been beneficial and convenient, avoided formal waiting for the valuer's report by providing that his

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opinion should be taken, and should be ready, before the hearing came on. But as *the scope* is unlimited, so it appears to me that *the character* of the reference is strictly limited, and I hold that there is absolutely no power whatever, on the part of the Land Commission, to refer anything to any valuer for his opinion, in the sense of transferring any of its own jurisdiction to him, or of shifting it off upon him. The more I widen the scope of the power to refer, the more I limit the character of the reference when it takes place, and the words of the Act of Parliament appear to me to be as clear as words can be upon that point. The valuer is to report his "opinion," and the forming and reporting of that opinion must involve the investigation by him of questions of fact. This is proved by the circumstance that he is directed to accompany his report with a statement of all the facts required for enabling the Commissioners to form a judgment on the subject-matter. When they have got it, the Commissioners may, or may not, as they think fit, adopt the report. What then is the legal aspect, and effect, of such an unlimited power *to refer*, coupled, as it is, with an entire exclusion of any power whatever *to delegate*? I think we find an answer in *Re Dawdy* (1). Lord Esher says, dealing with a contention that a certain reference amounted to a reference to arbitration, "it has been held that if a man is on account of his skill in such matters appointed to make a valuation in such a manner that in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge, and his skill, he is not acting judicially, he is using the skill of a valuer, not of the Judge. In the same way, if two persons are appointed for a similar purpose, they are not arbitrators but only valuers, they have to determine the matter by using solely their own eyes and knowledge and skill." Further on he practically repeats the same thing:—"I can see nothing in the first part of the clause of the document before me, which is to be interpreted on the same principles that we have to interpret the Act of Parliament, other than this, that two persons are to be appointed as valuers not arbitrators, there is nothing to show that they are to hear the parties and determine judicially between

(1) 15 Q. B. D. 430.

them." On page 431 he says:—"I come to the conclusion on the consideration of the agreement, that the two persons who are engaged are to be mere valuers, not arbitrators."

Starting with that, the important difference between my view and that taken by the Chief Justice and the Chief Baron in the Court of Queen's Bench arises at once on the "fair rent." I take the simplest case, a case not complicated by any question about improvements of any kind, a case not complicated by any items, but one in which the one and only question in litigation between the landlord and tenant is—"How much ought to be the fair rent of this holding as between us?" It occurs to me that, under such circumstances, the amount of the fair rent is a thing which an expert is better qualified to decide than anyone else can be. I go to the Act of 1881, section 8, and I find that it—this fair rent—is to be ascertained by a consideration of the circumstances of the holding and the district, and other matters, including the interest of the landlord and tenant in the particular case, and I find that the power of asking the opinion of an independent valuer extends to any matter the Commission may desire to refer to such valuer. The Commission may, or may not, adopt the report; but I fail to see how it can possibly be made an objection to the reference, in such a case as I have put, if the subject-matter referred to the valuer for his opinion is the amount that ought to be the fair rent in that case between those two people.

Fair rents have been, in countless cases, settled by the aid of independent people of special knowledge and skill, out of Court, and such people, and even landlords and tenants unaided, have been able, I think, to understand that the rent fairly payable by an old occupier is not necessarily the same which could be got from a new comer, without puzzling themselves over "occupation interest." I cannot see that the Land Commission is disabled, by law, from seeking like help, or considering like matters, when doing the same thing.

The Queen's Bench has held that what is the fair rent is a mixed question of law and fact. With all respect, I prefer the view of O'Brien, J. He says that "in determining what is a fair rent, considerations of law must necessarily arise, and it must be fixed in accordance with the principles of law, but the fact that it

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is to be settled in accordance with the principles of law is a thing that won't make it necessarily a question of law itself." Some one said, when this argument was pressed here, that it was the same thing as fixing the price of a brass kettle. No price can be fixed for anything without bringing in principles of law. You might have to decide legal questions as regards the validity or application of a patent, even in fixing the value of a brass kettle, or the price might involve disputed or doubtful claims to specific advantages. It appears to me to be impossible to limit the scope of the power to refer the question of the amount of the fair rent, always safeguarding it by a distinct statement that it can be referred for opinion only, and that there must be an adjudication by the Land Commission, and by it alone. The Land Commission has very distinctly disclaimed, in Mr. Seaver's affidavit, having ever referred any question, except in the sense of calling for an opinion and report. I cannot fail to see that what occurred in this case, and what has occurred in others, naturally gave rise to the impression that they had done more. When the Sub-Commission pronounced its decision as to the fair rent and filled its pink schedule, that pink schedule and the order to which it was attached, amounted, if not reheard, to a complete adjudication upon the whole matter, and before the rehearing the whole of that was referred to the valuers by the Land Commission. In that sense the Lord Chief Baron's statement is fully in accordance with the fact. He says that "all these questions" —meaning the whole case—" were referred in his opinion." The Lord Chief Justice in the same way says that where they miscarried was "in putting into the hands of the Court valuers, as defining the extent and limits of their duty, the documents which I have referred to as common form, acting under which the Court valuers purported to estimate the fair rent, for the purpose of reporting what, in their opinion, a fair rent should be, and the very estimation of the fair rent, even though made for the purpose of reporting an opinion, nevertheless involved the consideration of questions of mixed law and fact." I cannot adopt his view that this was a miscarriage, because I think that we are, at least on *certiorari*, bound to intend in favour of the Land Commission, that it did not make this reference to the valuers, otherwise than it was

justified in doing—namely, for their opinion—and *In re Dawdy* (1) then becomes an authority in favour of the order of the Land Commission, because it puts on the act of placing the papers in the hands of the valuers the construction that they were so placed in their hands as valuers called upon to report their expert opinion and nothing more. As valuers, I think the Land Commission were entitled to look to them for a report, but when the report came back, the Land Commission was bound to exercise its own judgment, as a judicial authority, upon it.

We may suspect, and believe, and the parties naturally did believe, that the members of the Land Commission allowed this report to affect their minds too much, and to such an extent that the function of fixing the fair rent was really delegated to those who made the report. We cannot intend that they did so, and my opinion is that they did not do so. On the second inquiry, I find that evidence was taken with regard to the fair rent and the improvements, and that witnesses were heard on both sides with regard to the whole subject-matter. When the Act of Parliament gives power to the Land Commission to call for the opinion of the valuer, it also gives them power to adopt it, so far as they think fit. The scope of the word "adopt" must extend to whatever is covered by the true interpretation of the word, "refer." "Adopt" does not mean adopt *so as to make the report the order*. It appears to me to mean only that the Land Commission may use it, may agree with it, and may act upon it, and when Parliament gave this power, it is impossible on *certiorari* to find fault with the mode in which it has been used.

For these reasons it occurs to me that this order to refer was within the power of the Land Commission, and I would leave the matter there, but for the hope that the full discussion of this matter here, and the full expression of our views on the present occasion, may be of some practical use. I refer to what has happened since the hearing in the Queen's Bench, for the purpose of illustrating the difficulty of putting the narrower construction upon the scope of this power to refer. Bewley, J., stated that when the form was impugned, in deference to the opinions of

(1) 15 Q. B. D. 430.

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the Judges of the Queen's Bench, the Land Commission took such steps as would make it impossible to contend in the future that anything in the nature of a question of law was involved in the report of the Court valuers, and the way in which that was done was by adopting a new form of report. We have got that new form of report, and I am bound to express my opinion that it does not meet, in substance, any one of the observations made by the Queen's Bench upon the former form. In reality, it is in every respect as objectionable as the former one was, if the Queen's Bench was right. It is curious that it was originally printed, and is still printed as of old, with the heading—"Valuers' report as to fair rent," and the words "fair rent" have only undergone the Russian process of obliteration, leaving them still perfectly legible. But this is a detail. In the body of it, No. 1 in the new form is the same as Nos. 1 and 2 in the old form, leaving out the figures; No. 2 is the old No. 5; No. 3 gives the result of the old No. 2, bringing the figures back again. The former No. 4 appears as No. 6; No. 5 is the old No. 3, and the only real difference between the two forms is that the words "fair rent" are left out, and the words "letting value" are put in instead, and the final computation, or result, is not given, though all the deductions, and the other materials for calculating the result, appear as before, with the single exception—apparently against the landlord's interest—that the figures which were given in the old form, showing the value of any improvements credited to the landlord, are omitted. Bewley, J., says that this form is to be no longer communicated to the parties because they would misunderstand it, and mistake the sum of the figures given for the fair rent. So they might, because the sum in compound arithmetic of deducting the amount of the tenant's improvements from the "letting value" is not performed on the face of the paper. In that respect alone does this form materially differ from the old one. I think it is of very great consequence to point out that it is proved by this experiment to be impossible to frame any form of report to be given by a Court valuer that will not include the very thing that is said to be a mixed question of law and fact upon which he ought not to report at all—namely the amount of the fair rent. The old form appears to me to be in effect the same, so far as

that question is concerned, as the new one, and, speaking for myself, I prefer a form which the parties got, and could understand, to a form which is withheld from them, because they would misunderstand it if they got it.

But there is one far more important thing still to be mentioned. No reference made in the preliminary way in which these references have been made, can ever be satisfactory to the parties, or can be regarded as a satisfactory mode of administering justice, if it is not made as fully known to the parties as it is to the Court. Litigants can not be left, under our law, in the dark as to the grounds of judicial decisions which affect them. I concur, in the strongest way, with what Bewley, J., has described as the "judgment of great weight," pronounced in 1882 by O'Hagan, J., with the concurrence of Mr. Commissioner Litton, holding that the parties should have an opportunity of seeing these reports. No form which the parties are likely to misunderstand can be a satisfactory one. If a report is made at all, it ought to be made so that everyone who sees it can understand it, and above all, the parties, when it is made, ought to see it before it is used against them. The practice, irregular if you will, that has been in existence since the commencement of this jurisdiction, of anticipating the order calling for these reports, has been, I believe, as Bewley, J., says it has been, of advantage and convenience to the parties, chiefly, if not entirely, because it has let them know beforehand what an independent valuer thinks about the subject-matter of the rehearing. If it were proved that the Land Commission, on the rehearing, acted upon the judgment of the valuers as an anticipation of the performance of its own duty by the Commission, I would hold its order to be bad, and I would hold that such a misfeasance could be shown by extrinsic evidence, and would be within the authority of the Queen's Bench to reach.

The last observation which I wish to make goes to the root of a principal part of the Chief Baron's judgment. I am not bound to express a definite opinion upon it here, but I cannot hold, without further argument than has yet been brought before me, that a Court of inferior and limited jurisdiction can, by making a pure mistake in law, *i.e.* by deciding a question of pure law wrongly, ever give itself a jurisdiction which it would not otherwise possess,

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and so prevent an order otherwise bad from being quashed on *certiorari*. Veil it as you will, if that is the *ratio decidendi* of two of the Judges of the Queen's Bench in this case, I entirely dissent from it. The impugning of the jurisdiction here on what is called the ground of real bias rests on the substitution for the statutory and constitutional judgment of a lawful Court the judgment of an unauthorised authority; and I do not believe that any inferior tribunal can, by any mistake either of law or of fact, substitute for the exercise of its own jurisdiction the exercise of a discretion by somebody else, or the judgment of anyone else. My Lord Chief Justice concludes his judgment on this point by answering the question with regard to "the man in the street." But, with every deference to him, I am unable to see that what he says would not be equally applicable to any unauthorised extension of jurisdiction to a valuer. "One topic," he says, "before I conclude. Mr. Ronan and Mr. Campbell asked somewhat impetuously, could the members of the Land Commission consult the man in the street—who is so frequently referred to by way of illustration—ask him to estimate a fair rent and adopt his opinion. It is to be remembered that the Land Commission, in the eye of the law, is an inferior Court, and if the members of the Land Commission were guilty of the gross misfeasance suggested, no Judge, no tribunal, would have any difficulty in holding that they were so biased as to render their decision the decision of an incompetent tribunal, and therefore capable of being challenged by *certiorari*." The same principle must apply, if they referred to valuers what they ought to have decided themselves. Those valuers would be to all legal intents and purposes only so many "men in the street," for the purpose of determining the validity of the tribunal, and the whole foundation of this impugnment of an order of an inferior tribunal is that the case has been *coram non judice*, and that the decision is the decision of one who is *non judex*. In my opinion, for the reasons I have given, the reference was within the power of the Land Commission, because it was only a reference to take the opinion of the valuers, and after having taken the opinion of valuers the Land Commission must be taken to have decided this case upon its own judgment, and therefore the excess of jurisdiction and the misfeasance charged did not take place.

I am sorry to have occupied so much time; but my reason for doing so has been, as I have said, that I do believe that a full ventilation of the views which we entertain of the powers of the Land Commission in this most important matter, and of the mode in which that power ought to be exercised, distinguishing the jurisdiction which the Commission is bound itself to exercise from the assistance which it is at liberty to get from valuers, will tend to the establishment of the practice upon a basis that will be in accordance with the law, and will do justice, and will show that this Court does not sustain the order which has been impeached upon the very difficult and narrow ground that, although the Land Commission has been doing everything that is wrong, we cannot get at it by *certiorari*. I prefer to refuse the writ upon the more satisfactory ground that what has been done has been in the main right, although in the details of it, such, for example, as the statement of the special case, we may not feel satisfied with the course taken.

One word, and it is the last, upon the distinction between *mandamus* and *certiorari*. If in this case, upon what is proved in Mr. Monroe's affidavit to have been done upon the application to state a special case, the Court made an order refusing the application, without deciding that the application was frivolous and vexatious, it occurs to me that a writ of *mandamus* to consider and decide that question, or to state a case, might have been applied for, upon the principle of *Lord Rossmore's Case* (1), but that question is not before us in any shape or form. The order refusing to state a case was not made a subject of appeal; so far as I know, an application was not made for leave to appeal, nor does it appear that the questions at issue could have been fully raised upon an appeal, but that is not the subject-matter of the application for a *certiorari*. The *mandamus* asked now is a *mandamus* to hear and determine the whole case, and is, therefore, consequential upon the *certiorari*. The *mandamus* given in the *Case of Lord Rossmore* (1) was a *mandamus* to consider an interlocutory application for liberty to state a case, which we considered had not been fully considered or decided. Similar materials to those on which we came to that

(1) [1894] 2 Ir. R. 394.

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conclusion might have been supplied by the affidavit to which I have referred in the present case, but the statement of a special case, if insisted on, would have probably left the matter exactly as it is, because the matters to have been discussed upon the case would have been practically the same which have been discussed now.

WALKER, L. J. :—

I concur. Mr. Ronan, as he was entitled to do, argued the appeal in this case on the facts and figures appearing in Shepherd's case. In it an order was made by the Sub-Commission on the 19th December, 1896, fixing the judicial rent at £36; the order had attached to it a schedule, as required by the Act of 1896. The only matter appearing on that schedule which I think it necessary to notice is the statement in it under the heading, "State any other matters in relation to the holding that have been taken into account in fixing the fair rent thereof," as follows :—"This holding is subject to the Ulster Tenant-right Custom, but no special deduction has been made on account thereof." This observation is only relevant if bearing on the statement regarding the custom appearing on the schedule to the order of the Head Commission.

I think the meaning of the statement in the Sub-Commission schedule is very plain. The Act of 1896 says :—"No deduction shall be made except such deductions as shall be specified and accounted for" in the schedule; and this schedule, while it records an incident to the holding most desirable to mention, adds, in effect, no deduction capable of being stated, specified, or accounted for has been made by reason thereof. So all the parties understood it; for when the tenant served his notice of rehearing on the 5th February, 1897, he stated as the grounds (being bound to set them out), that the deduction in respect of drains and fences was insufficient, that the acreable rent was too high, and that no deduction was made from the rent on account of the Ulster Tenant-right Custom. The landlord served a cross-notice on the 8th February, based on the grounds that the acreable rent assessed was too low, and that the amount allowed for tenants' improvements was excessive. The complaint by both was as to the amount of the fair rent.

The appeal being thus at issue, Mr. Bomford and Mr. M'Afee were given at the office of the Land Commission the Sub-Commission schedule, and a form asking their opinion as to the estimate of fair rent which had been made. Those valuers made their inspection on the 9th March; and on the 13th March they made a report concurring in the fair rent.

The Land Commission on the 15th March served notice on the parties, informing them that for the rehearing they had caused a valuation to be made by Court valuers of the holding, and that the fair rent estimated by them was £36, but that the parties were not bound to accept that estimate. The rehearing took place on the 18th March; and on the 31st May an order was made affirming the sub-Commission rent, which in no way refers to or professes to be founded on the Court valuers' report; and this order has a schedule attached to it as required by the Act of 1896.

Leaving out of view for the moment the question whether there is anything on the face of that schedule to show want of jurisdiction which raises another consideration, the main contention for the appellant was based upon the fact and form of the Court valuers' report. Its form and the report thereon were assailed as made without, and in excess of, jurisdiction, such as to be capable of being extrinsically shown. The contention resolved itself into many heads:—

1. It was said there was no direction proved or given by the Commission to a valuer to make a report.

2. That a report could not be obtained from two but only from one valuer.

3. That it was illegal for the Commission to ask for the report at the stage they did.

4. That the valuers were not "independent"; and lastly:

5. That the reference made was one of questions of law or mixed law and fact, and amounted to a delegation of all the duties cast upon the Commission, and in effect altered the constitution of the Court itself.

In result all these questions depend upon the construction of the powers in this respect given to the Commission, as it is admitted express power for some purposes is given.

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It will be remembered that the Land Code, and I think designedly, contains no definition of fair rent. The Act of 1881 specifies certain matters which are to be taken into account in determining its amount, and I think a question whether a particular factor should or should not be taken into account may be a question of law, but the amount is not, and an appeal from its amount is excluded, apparently because it was considered a mere matter of value, on which also there can be no appeal. The Land Commission, as constituted, consisted of three members—a judicial Commissioner whose qualifications are of course defined, and two whose qualifications are not. A provision that they should be able to obtain skilled assistance, in the opinion of skilled men, was a most natural one. [The Lord Justice read sect. 48, sub-sect. 4.] When the valuers were employed a notice of appeal had been given by both sides, and an issue (in this case apparently of mere value) had been raised. I do not, however, desire to avoid the determination of the general question. First as to the stage at which the reference was made. Why should not the Commissioners take steps to have the report at the coming hearing? It is obviously convenient. The objection as to the stage at which the report was sought seems to me wholly unsubstantial, and if yielded to would produce confusion and inconvenience and delay. Next I read the word "independent" as equivalent to not engaged for either party, and having no interest. That they valued before in the County Armagh would seem only to improve knowledge, and I decline to say that an assistant Commissioner nominated by the Lord Lieutenant is not independent, because he has been so nominated. The words authorising the reference are of the largest kind—"any question" is equivalent to "any one or more questions." So are the words "any matter," and the direction to include a statement of facts and circumstances involves an ascertainment on the spot of matters of fact by the sight and ears of the valuers. The Commission form a judgment on the report. They reject it or act on it, but the judgment, and action, or rejection are theirs. The words "form a judgment" show that the duty and responsibility are expressly reserved to them. Look to the course of practice. *Adams* v. *Dunseath* (1) was heard on the 9th

(1) 10 L. R. Ir. 109.

January, 1882. It was, I believe, the first appeal heard. No one questioned the propriety of the employing of two Court valuers. The only contention was over the stage at which the report should be made known to the parties, and many Land Acts have been passed since without interfering with the settled practice on which the rights of so many thousands have been settled. It seems to me obvious that the questions asked in the reference might be asked separately, and if so why not in the one reference?

Take the crucial case—Is it lawful under section 48, sub-sect. 4, to ask the advice and assistance of a valuer as to what should be the fair rent of the holding? I must say for myself that I emphatically decline to give any definition of fair rent. An exhaustive definition was never intended by the code, and any definition purporting to be exhaustive which I have yet seen suggested seems to me to contain some adjective or descriptive word itself requiring definition and explanation.

Suppose a landlord and tenant are about entering into an agreement to fix a fair rent under section 8, sub-sect. 6, and the landlord asks a valuer to report to him what he thinks should be the fair rent, would anyone suppose that he was doing more than seeking skilled opinion upon a question of fact—the fair rent to be paid under all the circumstances. Perhaps an evolution of the facts and circumstances to be stated will raise some legal question on which the Land Commission may have to decide, and some one or more of the constituent elements for consideration in estimating the rent under the Act of 1881, may become a fit subject for a case stated, but fair rent in result must, I think, be always an estimate and matter of value.

I think the subsidiary question, whether there was any direction to refer is closed by the letter of the Land Commission of the 15th March, taken in connexion with what preceded it; and it would be altogether too technical in the face of the long settled practice to refuse to read, "an independent valuer" as equivalent to one or more valuers. If I am right, the argument founded upon any supposed delegation of duties, or the referring to the valuers questions of law, or mixed questions of law and fact, falls to the ground. They refer nothing for decision or

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determination, and they retain and are charged with the duty of forming an independent judgment.

But assuming they interpreted the express power of reference given to them too widely, and I limit it to such a misconstruction as is short of delegation of duties, can this mistake be reached by *certiorari*? What is their position? They have clear jurisdiction over a subject-matter which exists—the relation of landlord and tenant. They have authority to decide all questions of law and fact. All proceedings before them are judicial proceedings of a Court of Record, and *certiorari* is expressly taken away.

There is no doubt that an unauthorised association of a third person in their judicial proceedings and decision would affect the competency of the Court and create an objection to its jurisdiction, the existence of which could be shown by extrinsic evidence. This is a type of the class referred to in *The Colonial Bank of Australasia* v. *Willan* (1).

There is another rule appearing in some of the cases, and referred to by Mr. Ronan, that a Court of limited jurisdiction cannot give itself jurisdiction by an erroneous decision that it possesses it; that is, as a general rule true. Lord Denman says of that rule in *Reg.* v. *Bolton* (2): "It is obvious that this may have two senses: in the one, it is true; in the other, on sound principle and on the best considered authority, it will be found untrue." In applying that rule regard must be had to the statutory powers of the Court—whether the question is a branch of the subject over which the Court has jurisdiction as to law and fact, or (and here we come to a different consideration) is a matter collateral to the merits upon which the limit of the jurisdiction depends, or is a presumed legal bias arising from circumstances which can be extrinsically proved.

It cannot, I think, be contended that when a Court is engaged in an inquiry over which it has jurisdiction, and having power to decide all questions of law and fact that may arise in it, makes an erroneous decision honestly on a matter which it might have decided rightly, an error has arisen which vitiates an order upon which it does not appear to be founded. The only objection to

(1) L. R. 5 P. C. 417. (2) 1 Q. B. 72.

the exercise of jurisdiction here, when properly considered, seems to me to be that the Land Commission, having an issue before them which they were competent to try, and having power to seek advice and assistance for the purposes of that issue, determined erroneously the legal extent of their powers of reference, and asked for an opinion in too general terms, acting honestly in this error.

It is not necessary for me to express any opinion upon some of the questions raised in the judgments in the Queen's Bench Division arising upon an assumption of delegation which I do not think exists, but I am not to be taken as expressing any dissent from any of the conclusions arrived at by the Lord Chief Justice and the Lord Chief Baron.

As to the schedule itself I do not think it necessary to add anything to what has been already said upon the question whether any defect of jurisdiction appears on the statements in it as to fences and buildings; we are not hearing an appeal from the order.

With regard to the statement—"The holding is subject to the Ulster Tenant-right Custom," it is in the first place a most proper and convenient matter to record, and it by no means follows that a deduction has been made from the rent on account of its existence, and on *certiorari* we cannot intend it.

I believe the decision in *Reg.* (*Gosford*) v. *The Irish Land Commission* will lead to a final settlement of the practice, and putting it on a firm basis, and in that sense the litigation may prove useful. At one period of the case I doubted if it could have any useful result. If it leads to a recurrence to the practice so long settled both as to the form of the reference and report, and the mode of dealing with it, I for one shall not be dissatisfied, and I join in the expression of the hope that it may.

HOLMES, L.J.:—

Although the grounds upon which I have come to the conclusion that the conditional order for the issue of the writs of *certiorari* and *mandamus* ought to be discharged differ in one respect from those relied on by the Judges of the Divisional Court, my

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complete concurrence with most of the propositions to be found in their judgments enables me to state my views with comparative brevity.

I agree with the Queen's Bench Division in holding—1. That the Land Commission is not a Superior Court in the technical sense in which that phrase is used in our law, and therefore it may be possible under certain circumstances to have orders made by it quashed by means of the writ of *certiorari*. 2. That it is an independent, although not a Superior Court, and is authorised to decide all questions of law, or fact, arising in matters within its jurisdiction. 3. That as it is expressly enacted that proceedings before it cannot be removed by *certiorari*, the writ of *certiorari* can only issue either (*a*) where it has acted altogether without jurisdiction or, in other words, where it had no power to enter upon the inquiry; or (*b*), where a want of jurisdiction appears on the face of its order. I understand that these propositions are substantially admitted by all the counsel by whom the appeal has been debated, and that the grounds upon which the appellant rests his case are that the order itself shows a want of jurisdiction, and that even if it were valid on its face, circumstances had occurred which had the effect of completely depriving the Land Commission of jurisdiction to enter on the judicial investigation which resulted in the order.

It has not been questioned by the appellant's counsel that the schedule dated the 31st May, 1897, is incorporated with the order of the same day, and indeed not only their arguments but also the conditional order itself are based upon the fact that the schedule and order are to be read together as a single document. The absence of a reference in the one paper to the other is at most a clerical error, which could and would be corrected by the Land Commission on application of either of the parties; and therefore without adopting the ingenious means of incorporation resorted to by the Chief Baron, I have no difficulty in holding that the two documents taken together constitute the order of the Court.

Cope v. *Cunningham* (1) was a case stated, which it was possible to dispose of without deciding whether an order, fixing a fair rent, where there was no schedule, would be made without jurisdiction.

(1) [1897] 2 Ir. R. 467.

But I agree with the view of Palles, C.B., and FitzGibbon, L.J., in holding that the jurisdiction to fix a fair rent cannot be lawfully exercised in the absence of a request to the contrary from the landlord and tenant, without ascertaining and recording in the form of a schedule the matters prescribed by the first section of the Land Law (Ireland) Act, 1896. There is, however, nothing in the propositions laid down by them to justify the inference that where the Land Commission purports to ascertain and record those matters, the order is rendered null by the fact that there is some irregularity, vagueness, or mistake in the contents of the schedule. There are many ways in which the nature and character of improvements may be recorded. In Rooney's case the improvements are stated to be fences and buildings, the removal of boulder-stones and drains of a certain measurement; and the present capital value of each is given with the increased letting value due thereto. This is certainly a compliance in terms with the provisions of the section; and it would be the introduction of an entirely novel principle of law to hold that the document itself and the order based upon it are vitiated merely because the description might be made more specific than the Court having the jurisdiction to frame it considers necessary. The same observations apply to the particulars of the increased letting value due to improvements, and of the deductions from the rent on account thereof. It is the duty of the Land Commission to ascertain these amounts; and, if in doing so, there is an error in either law or fact, it may be corrected on appeal, or by a case stated, but affords no ground for a writ of *certiorari*.

The statement No. 8 presents a greater difficulty. On the one hand I am of opinion that the only matters intended by the section to be mentioned here are matters, the direct effect of which is to reduce the fair rent below what it would otherwise be—on the other hand I am of opinion that the fact of a holding being subject to the Ulster Tenant-right Custom can have no such effect directly, although indirectly, by raising a presumption regarding improvements, or in some other way, it may be of importance. If I am right in these views, the reference to the Ulster Tenant-right Custom is out of place. But the Land Commission has jurisdiction to decide all these points; and the question

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really is what, according to the true construction of the language, has been decided? If the decision is that, having taken into account that the holding is subject to the custom, the Land Commission is of opinion that the amount of the fair rent ought not to be affected thereby, no objection can be taken to the statement. If, on the other hand, the meaning is that the fair rent has been by reason thereof reduced, it would then seem to me that an essential part of the schedule has been omitted altogether, namely, the amount of such deduction; and that, therefore, the fair rent has not been ascertained at all in the manner provided by the statute. Between these two constructions, the intendment ought to be in favour of that which would not nullify the order. The words are, in my opinion, capable of either meaning. The absence of the amount is in favour of the first-mentioned; and accordingly I adopt it, with the resulting conclusion that there is no want of jurisdiction apparent on the face of the order.

The remaining question is whether the Land Commission, by the reference to the two valuers, deprived themselves of jurisdiction to enter on the inquiry. Now, I think it clear that if a limited jurisdiction is given by statute to an inferior tribunal to decide certain matters in litigation, and if before it begins its inquiry, it were, without statutory authority, to call for, and receive, a report from an outsider of his views on some of the very subjects which it was bound to decide judicially, it would be thereby disqualified from hearing the case. The ground of a disqualification of this kind is that an improper bias or prejudice on the part of the tribunal would be a probable result of its action. It amounts to legal misconduct, which does not necessarily involve any moral delinquency. Indeed in most of the cases where an inferior Court is held to have lost its jurisdiction on this ground, its members protest that they have not been affected in any way, and in many they have not as a matter of fact been consciously influenced. The result would, in my opinion, be precisely the same, if the Court having a limited authority to call for a report, were to exceed such authority by procuring one on matters which it had no power to refer. A tribunal cannot free itself from the effect of misconduct by showing that it was led into the misconduct by an innocent but erroneous conception of its powers. I agree

with O'Brien, J., in holding that the rule which makes an inferior tribunal the judges of law as well as of fact, and makes the admission or rejection of evidence improperly, no ground of objection to its decision, does not apply to anything but the hearing in which the decision was made, and cannot be held to cover the illegal execution of a statutory power in a collateral proceeding, which is made the means of producing an element in the result. For these reasons if I were of opinion that the reference was either wholly or in a substantial part illegal, I should be obliged to hold that the order was made without jurisdiction.

This is the point on which I differ from the judgments of the Divisional Court, and which obliges me to examine the character of the report. There are one or two preliminary matters to be considered. It is strongly argued for the appellants that the only reference contemplated by the statute was a reference on some subject arising in the progress of the hearing, and that it could only be made to a single person. If the question had been raised soon after the Act of 1881 was passed, much might have been said on both sides, but the best interpreter of a statute regulating legal procedure is the continuous procedure that has followed it. From the year 1881 to the present time, the uniform practice has been to make a reference before the rehearing, and generally to two persons. Litigants in their thousands have come and gone; there have been appeals after appeals to this Court in which the valuers' report has been referred to; there have been many amending statutes; and until the present case it has never been suggested that there has been any illegality in either the period of the reference, or the number of the valuers. I do not feel myself at liberty to give a construction to the provision which would be opposed to the construction that has been acted on for sixteen years, and which would nullify every fair rent order made by the Land Commission.

It is further said that there is no order of reference at all; and there is no doubt that what has happened in the present case shows great looseness and irregularity of practice. One would expect that in a matter of so great importance, and of such constant recurrence, there would be a general order of the Land Commission showing, by means of a *rota* or otherwise, to whom successive

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references were to go, and defining with precision what was to be done under them. The practice, in so far as it can be gathered from what occurred in the cases before us, seems to be that there is handed to two valuers by an official of the Land Commission the pink schedule prepared by the sub-Commission pursuant to sect. 1 of the Act of 1896, accompanied by a printed paper in which the valuers are requested, in the event of their agreeing with such schedule, to sign an appended memorandum, stating their concurrence; and in the event of their differing therefrom, to state in a form annexed the matters as to which they differ. Now if there was no reference by the Land Commission, there would be foundation for the appellant's argument. But there is no doubt that what was done was done with its authority, and is expressly recognized in their secretary's letter dated March, 1897.

The nature of the reference can only be understood by an examination of the pink schedule. In what I am about to say on this subject, I am giving only my own opinion. The matter is most contentious and difficult. As I have come to a very decided conclusion regarding it, and as such conclusion is, in truth, the foundation of my judgment, I state it without hesitation; but, in doing so, I commit no one except myself.

Requirement No. 1 contains nothing which a person inspecting the farm cannot see for himself. Requirement No. 2 is for a statement of the fair rent of the holding on the assumption that all the improvements thereon had been made, or acquired, by the landlord. It has been assumed that what is here asked for involves questions of law as well as fact, and therefore cannot be legally referred to a valuer. My view is that it is not only a matter within the province of a valuer, but also that it is a matter upon which the opinion of a valuer is of great assistanee. Long before the Statute of 1881 was contemplated, it was to my own knowledge usual upon estates, where there was to be a revision of rents, and where the relations between landlord and tenant were friendly, for the former to appoint a Land valuer of reputation, in whom it was supposed the tenants would have confidence, to revise the rents. What the valuer was supposed to do was to fix *fair rents*, that is to say, rents which a tenant who was there, and had no desire to leave, might be reasonably asked to pay, and which a

landlord, who had no desire to get rid of him, might be reasonably asked to receive. He was called on for his professional opinion on a matter of fact, and not of law. Latterly a great deal has been heard about the reduction of what would otherwise be the amount of the fair rent by reason of the value of the tenant-right, or of the tenant's occupation interest. These speculations seem to me to be the figments of a too active imagination, for which I can find no countenance in any statute, or judgment of any authoritative Court. They appear to have originated in the idea that a fair rent is to be arrived at by the application of purely technical rules without any regard to the dealings of men with each other. A qualified valuer ought to have the technical skill to know the productive capacity of the soil, the cost of production, and the price of produce. He ought also to have such experience as to enable him to understand the circumstances of the case, holding, and district, including of course a knowledge of the rents generally paid therein. Thus equipped, he is able to form a valuable opinion as to what should be the fair rent in the sense which I have given to the term—the only intelligible sense of which it is capable. A fair rent in this sense would certainly not be the rent, which at a public competition might be recklessly offered by a person, whom wealth, or poverty, or land hunger, had made improvident, nor would it be a rent arrived at without any regard for the price which the industrious, and sensible farmers in the neighbourhood are willing to pay for land.

Returning then to the pink schedule, I am of opinion that requirement No. 2 is a proper subject for reference to a valuer. The remainder of the schedule deals with valuation dependent upon certain specified matters of fact. Now, I think the true inference to be drawn from the handing of this document to the valuers, and the true construction of the paper that accompanied it, is that the valuers were asked to state their concurrence or disagreement with it in so far as it was a valuation, and on the basis of the matters of fact set forth therein. That this was what was understood by the Land Commission appears from the letter of March, 1897, in which it is called a valuation. I should have so regarded it, if I had received it myself as a valuer; and the

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intendment of the law being in favour of what is lawful, I have no hesitation in so construing it.

For these reasons I am of opinion that the Land Commission did not deprive itself of jurisdiction by this reference. The conditional order, therefore, cannot be supported on either ground.

Solicitors for the Earl of Gosford: *Monroe & Anderson.*
Solicitor for the Irish Land Commission: *W. Alexander.*

R. D. M.

[In the Irish Land Commission.]

RIPLEY, Tenant; MACNAGHTEN, Landlord (1).

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June 6.

([1899] 2 I. R. 446.)

Landlord and tenant—Land Law (Ireland) Act, 1896, *sect.* 1, *sub-sect.* (1) (*a*) —*Fair rent—Competitive value—Occupation interest.*

The ascertainment of a fair rent under the Land Law (Ireland) Act, 1896, sect. 1, sub-sect. (1) (*a*) should not proceed upon the basis that the holding is *in the landlord's hands* free from any tenancy and available for letting to a solvent and prudent tenant desirous of acquiring a permanent as distinguished from a temporary tenancy; inasmuch as the assumption that the holding is in the landlord's hands would necessarily involve the element of competitive value, which ought to be excluded in estimating a fair rent.

No deduction is to be made from such rent in respect of occupation interest.

This appeal was heard at Armagh. The question submitted to the Court for its consideration was, whether the annual sum referred to in paragraph (*a*) of sect. 1, sub-sect. (1), of the Land Law (Ireland) Act of 1896, was the annual sum at which, after all the circumstances of the case, holding, and district, have been taken into consideration, the holding in the landlord's hands might reasonably be expected to let from year to year to a solvent and prudent tenant, who desired to derive a benefit from the occupation of the tenement and not from its sale; and whether the fair rent of the holding in paragraph (*g*) of the same sub-section (or the net fair rent), was the gross fair rent, less a reasonable annual allowance in respect of the sum which would represent the present value of the improvements.

Mr. Peel, solicitor, represented the tenant.

C. Murphy, for the landlord.

(1) The question in this case was also raised in seventesn other cases heard respectively in Armagh and Dublin.

Land Com. 1898.

RIPLEY, *Tenant;* MACNAGHTEN *Landlord.*

MEREDITH, J. :—

In this and other cases in the same estate, Mr. Murphy, as counsel on behalf of the landlord, contended that the principles upon which a fair rent should be fixed must have been disregarded by the Sub-Commissioners and the Court valuers alike. He argued that the evidence produced before us on behalf of the landlord demonstrated that consciously or unconsciously a deduction in respect of what is familiarly known as "occupation interest" had been made from the gross fair rent, and he urged that any such deduction was illegal and improper, and that it had been established by the cases of *Markey* v. *Lord Gosford* (1) and the *Queen* (*Lord Gosford*) v. *The Irish Land Commission* (2), that it was the duty of this Court when ascertaining (in accordance with the provisions of section 1, sub-sect. (1) (*a*), of the Land Act of 1896), "the annual sum which should be the fair rent of the holding, on the assumption that all the improvements thereon were made or acquired by the landlord," to deal with the case upon the basis that the holding was in the landlord's hands, free from any tenancy and available for letting to a solvent and prudent tenant desirous of acquiring a permanent as distinguished from a mere temporary tenancy. The same proposition (more or less elaborated) was advanced for our acceptance in the remaining appeals heard at Armagh (particularly in the case of *Blair* v. *Lord Gosford* (3)) and also at our sitting in Dublin, for the county of Louth. At the Dublin sitting, Mr. Donaldson as counsel for Mr. Ross L. Moore, the landlord and appellant in several cases, handed in at the close of his argument a document (in the form of a question) embodying in succinct form the contention he was instructed to urge. That document is as follows :—

"Whether the annual sum referred to in paragraph (*a*) of sect. 1, sub-sect. (1) of the Act of 1896, is the annual sum at which, after all the circumstances of the case, holding, and district, have been taken into consideration, the holding in the landlord's hands might reasonably be expected to let from year to year to a solvent and prudent tenant, who desired to derive a benefit from the occupation

(1) 31 Ir. L. T. R. 97. (2) [1899] 2 I. R. 399.
(3) Reported on case stated, [1899] 2 I. R. 453.

of the tenement and not from its sale, and whether the fair rent of the holding in paragraph (*g*) of the same section (or the net fair rent), is the gross fair rent, less a reasonable annual allowance in respect of the sum which would represent the present value of the improvements?"

The interrogative form has been adopted for obvious reasons, but Mr. Donaldson asked us to turn the question into a requisition of counsel, and insisted that as a matter of law the Court was bound to answer the question in the affirmative, and to fix the fair rents in these and all other cases upon the basis and assumption indicated in the requisition. Mr. Donaldson urged (as Mr. Murphy had already urged) that the views expressed by the Court of Appeal in the case of *The Queen* (*Lord Gosford*) v. *The Irish Land Commission* (1), in reference to the case of *Markey* v. *Lord Gosford* (2), demonstrated the accuracy of his legal proposition, and he relied upon the judgments of Fitz Gibbon, L.J., and Holmes, L.J., as briefly reported in the *Irish Law Times*. Since the argument we have been furnished, through the courtesy of the authorized reporter of the Court of Appeal, with full copies of the judgments referred to, and we are now in a position to state our views upon the questions argued before us. I indicated during the argument that so far as regards the question of "occupation interest" the case appeared to me closed in favour of the landlord by the decision in *Markey* v. *Gosford* (2). I have read the judgments in that case with the utmost care, and I entertain no doubt that the decision of the majority of the Land Commissioners amounted to an express and unequivocal declaration that any deduction in respect of occupation interest (whether conscious or unconscious, disclosed or undisclosed), from what would otherwise be the fair rent of a holding within or without Ulster, is illegal and improper. It is right that I should say that my own view entirely coincides with that of the majority of the Commissioners, but in saying so I must express my regret that I have the misfortune to differ (in this respect) from the judgment of my distinguished predecessor, Mr. Justice Bewley.

The question of "occupation interest" is, however, only one

(1) [1899] 2 I. R. 399. (2) 31 Ir. L. T. R. 97.

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of the points involved in the argument of Mr. Murphy and the requisition of Mr. Donaldson. The main point insisted upon by counsel was the necessity for the insertion of the words "in the landlord's hands" as a guiding and determining factor in the ascertainment of the gross fair rent under sect. 1, sub-sect. (1) (*a*), of the Act of 1896. Now, I was under the impression during the argument that this point also had been decided in *Markey* v. *Gosford* (1), but *adversely* to the contention of Mr. Murphy and Mr. Donaldson. Careful consideration of the case as reported in the *Irish Law Times* has confirmed my impression. Mr. Justice Bewley, as well as the three other Commissioners held, as it seems to me, that the Court was not bound to insert and would not insert in sect. 1, sub-sect. (1) (*a*), of the Act of 1896 the words, "in the landlord's hands," and thus read the section as if the Legislature had enacted as follows—"on the assumption that the holding was in the landlord's hands, and that, &c."

I desire to refer to some passages in the judgments delivered in *Markey* v. *Gosford* (1) in order to make this clear.

[His Lordship referred to the judgments, and continued]:—It is plain I think from these passages that all the questions raised by Mr. Murphy were discussed and decided in *Markey* v. *Gosford* (1). The Court decided that sect. 8 of the Act of 1881 was still the guiding and governing section, and that sub-sect. (1) of the 1st section of the Act of 1896 dealt with procedure and not with principles. The Court further held, and, in my own humble judgment, rightly held, that they were not bound to insert and should not insert in the statute words which the Legislature did not insert. For myself I cannot help thinking that the expression "in the landlord's hands" is manifestly susceptible of more than one meaning, and unless defined and restricted and safeguarded by further and elaborate definition, would be distinctly ambiguous. In the absence of such definition it almost necessarily (as it seems to me) involves the introduction of the element of competitive value into the estimate of a fair rent, and every member of the Court, in *Markey* v. *Gosford* (1), emphatically held that the element

(1) 31 Ir. L. T. R. 97.

of competition must be excluded. But does the refusal to introduce these words, as a guiding principle or rule of law, involve an allowance for occupation interest, or the rejection of evidence as to the fair letting value of the holding or the rents which industrious, prudent, and solvent farmers in the neighbourhood would be willing and able to pay for similar holdings. In my opinion it does not, and my colleagues Mr. Commissioner Wrench, Mr. Commissioner FitzGerald, and Mr. Commissioner Lynch who took part with me in the hearing of these cases, concur in my view.

Briefly stated, the decision of the majority of the Court in *Markey* v. *Gosford* (1), (as I read it) was that the gross fair rent under sect. 1, sub-sect. (1) (*a*), of the Act of 1896, should be ascertained and estimated in the way in which the fair rent would have been ascertained and estimated as between landlord and tenant prior to the Act of 1896 in the case of a holding, all the improvements on which had been made or acquired by the landlord—excluding the element of competition value on the one hand—and making no allowance or deduction in respect of occupation interest on the other. From the annual sum so ascertained a deduction should be made (in accordance with the Land Acts) in respect of the tenant's improvements, in order to arrive at the fair rent of the holding. In this way we endeavour to find "the 'fair rent' which the Land Commission is bound to fix as distinguished from the 'competition rent' which the landlord is no longer at liberty to exact." See judgment of FitzGibbon, L.J., in *Curneen* v. *Tottenham* (2).

So far I have dealt with the contention that the case of *Markey* v. *Gosford* (1) supports the argument advanced on behalf of the landlords. I now approach the case of *The Queen* (*Lord Gosford*) v. *The Irish Land Commission* (3). Of course Mr. Murphy and Mr. Donaldson did not argue that the decision of the Court of Appeal in that case ruled the points involved in the present argument. The learned counsel did, however, urge that in the judgments were to be found expressions of opinion strongly supporting the landlord's contention. I have not been able to discover any such expressions of opinion. [His Lordship referred to the judgments.]

The judgment of Holmes, L.J., was particularly relied on, and

(1) 31 Ir. L. T. R. 97. (2) [1896] 2 I. R. 363. (3) [1899] 2 I. R. 399.

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our attention was directed to the following passage (1): (I read from the authorised reporter's note of the judgment.) Speaking of the reference to the Court valuers, the Lord Justice says:—"The nature of the reference can only be understood by an examination of the pink schedule. In what I am about to say on this subject, I am giving only my own opinion. The matter is most contentious and difficult. As I have come to a very decided conclusion regarding it, and as such conclusion is in truth the foundation of my judgment, I state it without hesitation; but, in doing so, I commit no one except myself. Requirement Number 1 contains nothing which a person inspecting the farm cannot see for himself. Requirement Number 2 is for a statement of the fair rent of the holding on the assumption that all improvements thereon have been made or acquired by the landlord. It has been assumed in argument that what is here asked for involves questions of law as well as fact, and therefore cannot be legally referred to a valuer. My view is, that it is not only a matter within the province of a valuer, but also that it is a matter upon which the opinion of a valuer is of great assistance. Long before the statute of 1881 was contemplated it was, to my own knowledge, usual upon estates where there was about to be a revision of rents, and where the relations between landlord and tenant were friendly, for the former to appoint a Land valuer of reputation, in whom it was supposed the tenants would have confidence, to revise the rents. What the valuer was supposed to do was to fix *fair rents*, that is to say, rents which a tenant who was there, and had no desire to leave, might be reasonably asked to pay, and which a landlord, who had no desire to get rid of him, might be reasonably asked to receive. He was called on for his professional opinion on a matter of fact and not of law. Latterly a great deal has been heard about the reduction of what would otherwise be the amount of the fair rent, by reason of the value of the tenant-right, or of the tenant's occupation interest. These speculations seem to me to be the figments of a too active imagination, for which I can find no countenance in any statute or judgment of an authoritative Court. They appear to have originated in the idea

(1) [1899] 2 I. R. 444.

that a fair rent is to be arrived at by the application of purely technical rules, without any regard to the dealings of men with each other. A qualified valuer ought to have the technical skill to know the productive capacity of the soil, the cost of production, and the price of produce. He ought also to have such experience as to enable him to understand the circumstances of the case, holding, and district, including of course a knowledge of the rents generally paid therein. Thus equipped, he is able to form a valuable opinion as to what should be the fair rent in the sense which I have given the term, the only intelligible sense of which it is capable. A fair rent, in this sense, would certainly not be the rent which at a public competition might be recklessly offered by a person whom wealth, or poverty, or land hunger, had made imprudent; nor would it be a rent arrived at without any regard for the price which industrious and sensible farmers in the neighbourhood would be willing to pay for land."

It appears to me that there is not a sentence in these judgments which really conflicts with the views I have already indicated. Possibly the words "public competition," "recklessly offered," used by Lord Justice Holmes, may appear to give rise to a difficulty. Rightly or wrongly, we hold that any form of competition, which has the effect of unduly inflating the letting value of a holding beyond what would otherwise be its fair letting value, is not to be taken into consideration as a ground for increasing the fair rent. No one, of course, can doubt that competition is seen at its best or worst (according to the point of view from which it is regarded) amid the excitement of the crowded auction mart; but the price of land, as well as of any other property, may (as it seems to us) be abnormally and unduly raised by a person whom wealth or poverty or land hunger has made imprudent, but whose operations are not carried on at a public auction. I myself regard the expressions, "public competition," "recklessly offered," which occur in the judgment of the Lord Justice, as intended to be illustrative, not exhaustive. Subject to this, it appears to me that the opinions expressed in the judgments to which I have referred do not conflict with or over-rule the views of the majority of the Land Commissioners as expressed in *Markey* v. *Gosford* (1).

(1) 31 Ir. L. T. R. 97.

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The rents which have been fixed by us in this and the other cases in which I am about to deliver judgment have been fixed in accordance with the views I have indicated.

Solicitors for the tenant: *Peel & Co.*
Solicitor for the landlord: *Harris.*

J. MAC M.

[In the Court of Appeal.]

EARL OF GOSFORD, LANDLORD; BLAIR, TENANT (1). *Appeal.* 1899.

([1899] 2 I. R. 453.) Feb. 6, 7, 22.

Landlord and tenant—Land Law (Ireland) Act, 1896, s. 1, *sub-s.* (1) (*a*) (*g*)—*Fair rent—Occupation interest—"Circumstances of the case, holding, and district."*

The Irish Land Commission having at the request of the landlord stated a case for the Court of Appeal, raising the question whether in fixing the fair rent of a holding the Court is bound to assume and to fix the fair rent upon the assumption (*a*) that the annual sum referred to in sub-sect. (1) (*a*) of sect. 1 of the Land Law (Ireland) Act, 1896, is the annual sum at which, after all the circumstances of the case, holding, and district, have been taken into consideration, the holding in the landlord's hands might reasonably be expected to let from year to year to a solvent and prudent tenant who desired to derive a benefit from the occupation of the tenement and not from its sale; (*b*) that the fair rent of the holding referred to in sub-sect. (1) (*g*) of section 1 of the Land Law (Ireland) Act, 1896, is the annual sum referred to in sub-sect. (1) (*a*) of the same section less by a reasonable allowance in respect of the sum which would represent the present annual value of the improvements made by the tenant; the Court of Appeal declined to answer the question on the grounds that it was not a question of law which was within their jurisdiction to determine; that it was an abstract question, the answer to which would not necessarily affect the determination of the fair rent of the holding before the Court, and could not be of general application to other cases: and that the question was ambiguous and indefinite.

APPEAL by way of case stated from the decision of the Irish Land Commission. The case stated was as follows:—

"1. The area of the holding in this case is 25A. 3R. 10P., statute measure; the Poor-law valuation is £27 15*s.* on land and £5 10*s.* on buildings; total, £33 5*s.*

"2. The rent of the holding at the date of the passing of the Land Law (Ireland) Act, 1881, was £29 6*s.* 6*d.* By order of this

(1) Before FITZGIBBON, WALKER, and HOLMES, L.JJ.

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Court dated the 12th day of May, 1883, the fair rent of the holding was fixed at £22 10*s.*

"3. The tenant having served notice of an intention to fix a fair rent for a secondary statutory term, the case was heard by a Sub-Commission, who by order dated the 18th day of February, 1897, fixed the fair rent of the holding payable during the second statutory term at £16 13*s.* 11*d.* We refer to the said order and schedule of particulars of even date therewith.

"4. The landlord served notice requiring the case to be reheard before three Land Commissioners sitting together.

"5. The case was reheard before us at Armagh on the 5th day of May, 1898, when Mr. Charles Murphy, as counsel on behalf of the landlord, contended that in fixing the fair rent of the holding the Court was bound as matter of law to assume, and to fix the fair rent on the assumption, that the annual sum referred to in sub-sect. (1) (*a*) of section 1 of the Act of 1896, hereinafter called 'the gross fair rent,' was the annual sum at which, after all the circumstances of the case, holding, and district, have been taken into consideration, the holding in the landlord's hands might reasonably be expected to let from year to year to a solvent and prudent tenant who desired to derive a benefit from the occupation of the tenement and not from its sale, and that the fair rent of the holding referred to in sub-sect. (1) (*g*) of the same section is the gross fair rent less by a reasonable allowance in respect of the sum which would represent the present annual value of the improvements made by the tenant. At the close of the case Mr. Murphy submitted to us a requisition in point of law which was expressed in similar terms.

"6. We do not think it necessary to state the conflicting evidence which was given on behalf of the landlord and tenant respectively (and which was taken down by the official shorthand writer) as this case is conversant solely with a question of law of general application.

"7. We reserved judgment in this case, and in eight other cases on the same estate in which the landlord's counsel put forward the same contention, and on the 6th day of June, 1898, we delivered judgment in Dublin. We declined to accede to the requisition of counsel for the landlord, being of opinion that the Land Law

(Ireland) Acts contain no provision rendering it obligatory upon the Court (in fixing the fair rent of a holding) to make or act upon the assumption indicated in the requisition, and (in any event) being of opinion that the definition embodied in the requisition was ambiguous. We were of opinion that the fair rent of the holding should be fixed at £18, but at the request of counsel for the landlord we agreed to state this case for the consideration and decision of Her Majesty's Court of Appeal in Ireland.

"The question for the consideration and decision of Her Majesty's Court of Appeal in Ireland is:—

"Whether, in fixing the fair rent of the holding, the Court is bound to assume and to fix the fair rent upon the assumption (*a*) that the annual sum referred to in sub-section (1) (*a*) of section 1 of the Land Law (Ireland) Act, 1896, is the annual sum at which, after all the circumstances of the case, holding, and district, have been taken into consideration, the holding in the landlord's hands might reasonably be expected to let from year to year to a solvent and prudent tenant who desired to derive a benefit from the occupation of the tenement, and not from its sale; (*b*), that the fair rent of the holding referred to in sub-section (1) (*g*) of section 1 of the Land Law (Ireland) Act, 1896, is the annual sum referred to in sub-sect. (1) of the same section less by a reasonable allowance in respect of the sum which would represent the present annual value of the improvements made by the tenant."

The case stated bore the following indorsement placed upon it by the tenant's solicitor:—"The tenant having this day informed us that he is quite unable to bear the costs of appearing in this case, and having in consequence thereof declined to instruct us, we are unable to alter or approve of this draft on his behalf.

"(Signed), JOSHUA E. PEEL. 26 July, 1898."

Ronan, Q.C., and *Campbell, Q.C.* (with them *C. Murphy*), for the landlord:—

The "fair rent" of a holding is to be ascertained by examining the physical properties of the piece of ground therein comprised. In ascertaining this amount no difference is to be made by reason of the fact that the tenant is in occupation. No

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deduction is to be made from the gross fair rent in respect of "the occupation interest": *Markey* v. *The Earl of Gosford* (1). No doubt the right of the sitting tenant is dead as "occupation interest," but the Land Commission must be careful not to let it come into consideration "as one of the circumstances of the case." "The circumstances of the case" do not include matters personal to the tenant: *Lanyon* v. *Clinton* (2), *per* Walker, C. It would be mere trifling to say that this "occupation interest" is not to be taken into account under the words "interest of the tenant," but that it may be considered as one of "the circumstances of the case."

The question intended to be raised by the case stated is whether the fair rent of a holding is one sum when fixed between a landlord and a "sitting" tenant, and another sum when fixed between a landlord and an incoming tenant. If the Court does not consider the form of the question satisfactory it can be amended, or sent back to the Land Commission. The same point of law would be raised by putting the question in either of following forms:— "Has the gross fair rent in this particular case been reduced by an illegal consideration?" or "that the annual sum to be ascertained under the Act of 1896, section 1 (*a*) should not include any amount solely referable to the fact that the holding is in the occupation of a tenant."

[They also referred to *Curneen* v. *Tottenham* (3).]

There was no appearance for the tenant.

Cur. adv. vult.

Feb. 22.

FITZ GIBBON, L. J.:—

This matter has come before us upon a case stated by the Land Commission, on the application of the landlord, under the Land Act, 1881, sect. 48 (2), which requires the Commission to state such a case in respect of any question of law arising in a proceeding pending before it, unless it considers the application frivolous and vexatious. The jurisdiction is strictly limited to questions of law; we are bound to see that we do not overstep our

(1) 31 Ir. L. T. R. 37. (2) [1895] 2 I. R. 150. (3) [1896] 2 I. R. 37, 356.

lawful limits, and the course of the present proceeding makes it specially incumbent upon us to be cautious in this instance. The holding in question was subject at the passing of the Act of 1881 to a rent of £29 6*s*. 6*d*. By an order of the Land Commission of May 12, 1883, the "fair rent" was judicially fixed at £22 10*s*. The tenant having applied to fix a fair rent for a second statutory term, a Sub-Commission by Order of February 18, 1897, fixed the amount at £16 13*s*. 11*d*. The landlord served notice for a re-hearing by the Land Commission, which took place on May 5, 1898, when the contention was put forward which has led to the statement of the case; judgment was reserved in this and in eight other cases on the same estate, in which the landlord's counsel put forward the same contention, and on June 6, 1898, judgment was delivered, declining to accede to the requisition of the landlord's counsel, for reasons to which I shall presently refer, but the case states that the Land Commission were of opinion that the fair rent of the holding should be fixed at £18, being £1 6*s*. 1*d*. more than the amount estimated by the Sub-Commission.

The case is endorsed with the following memorandum signed by the tenant's solicitors:—"The tenant having this day informed us that he is quite unable to bear the costs of appearing in this case, and having in consequence thereof declined to instruct us, we are unable to alter or approve of this draft case on his behalf."

Therefore, as against the tenant, we are proceeding *in absentia*, and the duty of seeing to the just interests of an absent party is enhanced by the further statement which is contained in the case, paragraph 6:—"We do not think it necessary to state the conflicting evidence which was given on behalf of the landlord and tenant respectively, as this case is conversant solely with a question of law of general application." We are thus warned that any answer which may be given on this undefended case, upon hearing the landlord's side only, is intended and believed to be generally applicable to an unknown number of people, who have had no opportunity of being heard. Therefore it is our plain duty to see that we give no answer which can, under any circumstances, be dependent upon facts or evidence. In short, the question cannot be answered at all unless it is a universal legal maxim, axiom, or

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truism, applicable to every possible state of facts, independently of any possible evidence.

But furthermore, to be anything more than an abstract question, or mere "moot," which we ought not to answer, we must see that an answer will affect the rights of the parties to the proceeding in the particular case. How does this appear? On the landlord's application, the case has been reheard, judgment has been delivered, and the Land Commission has declared its opinion that the fair rent of the holding should be fixed at £18. The case does not state whether or how, or if at all by how much, that conclusion of the only matter at issue can be, or is to be, affected or reopened, according as the supposed "question of law" is answered in the affirmative, or in the negative, or is not answered at all; nor is it stated that the Land Commission, in fixing £18 as the fair rent, was affected at all, or if at all in what direction, by declining to consider the case in the manner required by the landlord. This alone would be an insurmountable objection, in my opinion, to answering the question, but it is not the only one, and as it might, perhaps, be regarded as being technical or formal, I do not further insist upon it.

The requisition to which the Land Commission declined to accede is embodied, *totidem verbis*, in the question submitted to this Court, viz. whether in fixing the fair rent of the holding the Court (meaning the Land Commission) is bound to assume and to fix the fair rent upon the assumption (*a*) that the annual sum referred to in sub-sect. (1) (*a*) of sect. 1 of the Land Act, 1896, is the annual sum at which, after all the circumstances of the case, holding, and district have been taken into consideration, the holding in the landlord's hands might reasonably be expected to let from year to year to a solvent and prudent tenant who desired to derive a benefit from the occupation of the tenement, and not from its sale: (*b*) that the fair rent of the holding referred to in sub-sect. (1) (*g*) of sect. 1 of the Land Act, 1896, is the annual sum referred to in sub-sect. (1) (*a*) of the same section, less by a reasonable allowance in respect of the sum which would represent the present annual value of the improvements made by the tenant.

This latter assumption (*b*) seems to be only a corollary to

assumption (*a*), or at least to be dependent on it, and I shall therefore confine my remarks to assumption (*a*).

The Act of 1896 may also be eliminated, because the annual sum referred to in sect. 1, sub-sect. (1) (*a*), is "the annual sum which *should be the fair rent* of the holding," on a certain assumption as to improvements only. What "should be the fair rent" under the sub-section (save as to improvements) must still be determined under the Act of 1881, section 8 (1). On this point I have only to repeat what I said in *The Queen* (*Gosford*) v. *The Land Commission* (1):—"It appears clear that the Land Commission is still to exercise the same jurisdiction which was conferred upon it by the Act of 1881, sect. 8, and that the sum which has been called 'the gross fair rent' is still to be ascertained and determined by the Land Commission, under the Act of 1896, as under the Act of 1881, by a similar process, and in a similar manner, and all that the Act of 1896 has done is to require that any deductions made from *that sum* shall be specified, and that certain of the materials used in ascertaining it shall be stated." It is "that sum," before any deduction, that is really in dispute here, and the Act of 1896 leaves its determination as it was before.

Thus the question put to us upon this case as a question of law, is seen really to be a question as to the mode in which the Land Commission is to determine fair rents in general. It is a question whether, in order to determine the fair rent payable by each occupying tenant to his landlord for his holding, the Land Commission is bound, as matter of law, and in every case, to make the assumption, contrary to the fact, that there is no tenant in occupation at all, and that the land is "in the landlord's hands." Not being a valuator, I have not the smallest idea—if I had any jurisdiction to determine, or even any right to express an opinion—whether in any given case the fair rent of an occupied holding should be the same as that of so much vacant land. If I were to hazard a guess, it would be that it should be sometimes more, sometimes less, but certainly not always, as matter either of law or of fact, necessarily the same. But I cannot pursue this speculation, for I cannot, for myself, reconcile my considering it at all with the

(1) [1899] 2 I. R. 420.

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Act of 1881, sect. 48 (2):—"No appeal from the Land Commission to the Court of Appeal *shall be permitted* in respect of any decision as to the amount of fair rent, or any question of value."

It is obvious that nothing can be referred as "a question of law" on a case stated, which this Court is forbidden to decide upon an appeal; and, for myself, I can not make anything out of the question on this case except "amount of fair rent," or "value," or both. The materials to be considered in fixing a fair rent, or even the mode of proceeding to fix it, may no doubt be the subjects of questions of law. But does this question involve these? The Act of 1881, sect. 8 prescribes what *the Land Commission* is to do, to what *it* is to have regard, and what *it* is to consider, before *it* determines what *is* the fair rent to be paid by the tenant to the landlord, for the holding which is the subject-matter of the particular proceeding. The question before us assumes, and in fact it states, that this section has been complied with, and the Land Commission has judicially declared its opinion that the fair rent of the holding is £18. None of the evidence is set forth, because it is stated that it is immaterial to "a question of law of general application." Whether we answer "yes" or "no"—whether we say that the Land Commission is to base its estimate of the fair rent on a false assumption or not—we do not know, and unless we illegally act as valuers we cannot answer, whether the £18 will be more, or will be less, or will remain the same, in the case before us; still less can we say, or see, how the like assumption would operate, if at all, upon what, in the judgment and under the exclusive responsibility of the Land Commission, might be declared otherwise to be the fair rent in any other case. If we did venture to intrude upon this forbidden topic, we have the judgment of Meredith, J., from which it appears to be as contrary to his view of his duty, as it is to our view of the law, that any specific allowance or deduction from the so-called "gross fair rent" for any so-called "occupation interest" can be made; and therefore it does not seem even likely that an affirmative answer to the question on the case would increase the £18 by any sum whatever.

If we were to treat the question strictly according to the letter, as simply asking whether the Land Commission was bound in

every case to make a false assumption of fact as the basis for determining a fair rent, we might answer it at once in the negative, because the Act of 1881, sect. 8 (1), prescribes no such assumption, and, on the contrary, it requires the Court to fix the fair rent between two litigating parties, one of whom is necessarily in every case an occupying tenant, and directs that regard shall be had to their respective interests, and that all the circumstances of the case, holding, and district shall be considered. If it had been intended that what I may call a theoretical method of fixing the amount of the fair rent should be adopted, Parliament should have said so. Precedents might have been found in the Valuation Act, 1852, sect. 11, either for making the estimate "with reference to the average prices of agricultural produce, taking into consideration all peculiar local circumstances, and assuming all rates, taxes, and public charges to be paid by the tenant"; or, on the other hand, for fixing "the rent for which, one year with another, the holding might in its actual state be reasonably expected to let from year to year, the probable annual average outgoings being paid by the tenant." But when Parliament deliberately directed that the fair rent should be fixed and determined by the Land Commission, and by it alone, in the manner prescribed by the Act of 1881, sect. 8, it cannot be made a question of law, for the decision of this Court, whether the Land Commission is bound, in every case, to exercise its prescribed and exclusive jurisdiction, and to arrive at the fair rent, by making an assumption contrary to the fact, and not mentioned in, or even consistent with, the statute.

Pressed with this difficulty, the landlord's counsel proposed to change the question. Mr. Ronan tried to put it in the form—"whether the 'gross fair rent' in the particular case had been reduced by an illegal consideration?" But we do not know whether it has been reduced at all, nor how it has been arrived at, and we have neither the means nor the power to arrive at it ourselves. Mr. Campbell tried to put it in the form—"that the annual sum to be ascertained under the Act of 1896, sect. (1) (*a*), should not include any amount solely referable to the fact that the holding is in the occupation of a tenant." But we do not know whether it does or does not include any such amount; and on the judgment of Meredith, J., we have not even any reason to believe that

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it does. Whether it does, or does not, we cannot tell whether such a fact, in any given case, should increase, or should diminish, or should leave unaltered, what the Land Commission alone can determine to be "the fair rent," and we are told that our answer is to be of general application.

But having regard to the fact that this case was stated in the very terms of a written requisition, presented by the only party who has appeared before us, and that the case tells us that the question is independent of evidence, and that the answer is to be of general application, I hold that we can not consider any alteration of the case at all.

While I agree with the evident proposition which was the first ground of the refusal of the Land Commission to accede to the requisition, namely, that the Land Acts contain no provision rendering it obligatory on the Court to make or to act upon the assumption indicated, I also agree with the second ground—that the definition embodied in the requisition is ambiguous. From this ambiguity it results that a simple negative can not be given without giving some colour to the contention that the fair rent to be fixed in this, or indeed in any case, should not be the same which it would be if the assumptions indicated were made. No answer can therefore be safely given, even if it could be lawfully given, and furthermore no answer could, in our opinion, lawfully be of general application. Therefore, in my opinion, we should declare that the question stated does not appear to be a question of law which it is within our jurisdiction to determine; that it is an abstract question, any answer to which would not necessarily affect the determination of the fair rent of the holding in question, and could not be of general application to other cases; and that the question is ambiguous and indefinite; and therefore that this Court should decline to answer it.

I have studiously avoided expressing any opinion upon those matters, put forward in argument, which we decline to decide. To some of these I have already referred in my judgments in *Curneen* v. *Tottenham* (1), and in *The Queen* (*Gosford*) v. *The Irish Land Commission* (2). Having carefully re-read those judgments, in defe-

(1) [1896] 2 I. R. 37, 356. (2) [1899] 2 I. R. 399.

rence to Mr. Ronan and to Mr. Campbell, I see no reason, as at present advised, to qualify or to alter anything therein, when understood as intended.

Though declining to answer the question upon this case, I must emphatically express my opinion, that the Land Commission took the right course in submitting it. The landlord's counsel presented their requisition in good faith, and when they submitted it as raising a question of law in which their client was interested, in a shape which they believed might lead to a decision which would set right what is asserted to be a wrong, I commend the course which was taken in acceding to their desire to bring the case here. When the Act of 1881, section 48 (2), provides for the statement of a case in respect of any question of law, on the application of any party, unless the Land Commission consider the application frivolous and vexatious, I venture respectfully to express my full approval of the extension of this relief, even where the Land Commission may not be entirely satisfied that the question is one which can be satisfactorily answered as a question of law; always provided that the application to state it is not, in the words of the Act, "frivolous and vexatious." We have had, in times past, more instances than one of complaints and of dissatisfaction, and even of proceedings for *mandamus*, *certiorari*, or prohibition, which would have been avoided by a more generous exercise of the power of stating cases, and of permitting appeals. Speaking for myself, I am glad when any opportunity is availed of for reviewing our decisions here. Appeals are always interesting, and they are generally instructive, and though the present attempt to obtain the assistance of this Court upon the matter which is honestly believed to be at issue has failed, for reasons which we believe ourselves powerless to overcome, it is due to the Land Commission that I should express my approval of the course taken in facilitating that attempt.

WALKER, L.J.:—

The Land Commission has power, when a question of law arises between litigants in a fair rent proceeding, to state a case for this Court and ask it to decide such question of law between the litigants, with a view to the ascertainment of their rights.

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In the present case Mr. Justice Meredith has decided—(*a*) that the fair rent is £18; (*b*) that in fixing that rent, nothing has been deducted for occupation interest. He has also refused to accept as the absolute and unalterable synonym for the gross fair rent, the definition or standard stated in the question, viz. "the annual sum at which, after all the circumstances of the case, holding, and district have been taken into consideration, the holding in the landlord's hands might reasonably be expected to let from year to year to a solvent and prudent tenant who desired to derive a benefit from the occupation of the tenement, and not from its sale."

Having regard to what Mr. Justice Meredith has decided, I think the proposed question is purely an abstract one, which we ought not to answer. It will decide nothing between the litigants. It has the additional infirmity of being vague and ambiguous; and Mr. Campbell, feeling that, proposed two amendments of it, but we cannot, against the absent party, deal with any other question than the one submitted, and it seems to me that the two suggested ones are still more abstract in form than that put in the case. The argument is that it must be taken against Mr. Justice Meredith, that something was necessarily allowed as a deduction to the tenant by reason of his being tenant, though he tells us the contrary. On the hypothesis of his judgment the question is, I think, an abstract one so far as regards the rights of the parties before us. We have no reason to suppose that the rent of £18 would be altered by one penny if the fair rent definition proposed were successfully pressed on Mr. Justice Meredith.

This shows that we are asked to decide some moot question. We are not the general advisers of the Land Commission for such purposes. Mr. Justice Meredith has told us the basis on which he has arrived at the fair rent, viz. by a simple adherence to the statute which, while it remains law, is as plain as can be, and must regulate the process.

The tenant whose fair rent is fixed, not only is, but must be in actual occupation, not out of occupation, and the rent is fixed with the view of his continuing to occupy, "and thereupon," in the words of the Act, "the Court after hearing the parties, and having regard to the interest of the landlord and tenant respectively, and

considering all the circumstances of the case, holding, and district may determine what is such fair rent." There is nothing in the first section of the Act of 1896 which alters this case, though provision is made for recording gross fair rent and deduction. In many instances there may be evolved from the process some element which can be stated to affect the amount, and which if it rests on a legal principle may form the subject of a case stated, but usually fair rent is the mere estimate of value, which the Court of Appeal cannot go into—a pure subject for an expert. The nature of the thing excludes the idea of mathematical certainty. One certainly ought not in working out the process, introduce into the circumstances of the case one circumstance absolutely contrary to the fact, and revise the rent on the basis of the tenant not being in occupation. It does not follow that a shilling is deducted because he is in occupation. For all we know, the rent may be fixed higher on that account in some cases; at all events, it is a domain which, by the Act of Parliament, we are excluded from entering upon; when a concrete case arises, stating figures which will affect the rights of litigants, we shall have a case to decide. I have thought it right, while declining to answer the question, to indicate plainly my opinion that the question proposes a guide vague and misleading and not warranted by the 8th section of the Act of 1881, or anything in the Act of 1896.

HOLMES, L. J.:—

If the question submitted to the Court were answered in the affirmative, it is doubtful whether it would have the effect of altering in any way the amount of the tenant's fair rent as fixed by the Land Commission, while it is certain that a rule would thereby be laid down applicable to all fair rent applications.

Not only would this be the result of the decision, but it was also the object of the landlord in asking the case to be stated. This appears clearly from the contents of the case and from the arguments of his counsel. I learn from the former, that both during the progress of the rehearing of the application before the Land Commission and also at its close, the Court was asked on behalf of the landlord to affirm a proposition which, converted into interrogative form, has become

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the question for our consideration and decision. The Court declined to accede to this requisition, being of opinion that the Land Law (Ireland) Acts contain no provision rendering it obligatory upon the Court (in fixing the fair rent of a holding) to make or act upon the suggested assumption, and being further of opinion that the definition embodied in the requisition was ambiguous. The case does not set forth the conflicting evidence given on behalf of the landlord and tenant respectively; nor is there anything exceptional in its omission. In framing documents of this kind, the statement of evidence is, as a rule, unnecessary and inexpedient; but there is generally found in them something to show the relevancy of the legal question to the matters in actual controversy between the parties. In the instance before us, for example, I should have expected to be told that the annual sum referred to in sub-section 1 (*a*) of section 1 of the Act of 1896, as ascertained by the Land Commission in the case of Blair's holding, was different from what it would have been if it had been ascertained upon the assumption mentioned; and I should also have expected a statement of the grounds of the difference, including any inferences of fact material thereto. No such information is supplied, and the explanation of its absence is that the "case is conversant solely with a question of law of general application."

The inference both from what appears in the case and from what is omitted from it, is that we are invited to give an opinion on an abstract question of law—a question that might be appropriately discussed at a reader's moot or in a legal treatise, but the consideration of which is not within the functions of this Court. Judicial tribunals in this country exist to adjust the rights and liabilities of parties to a lawsuit, and not to solve speculative problems. Where, as usually happens, the result of the litigation is a judgment, decree, or order, there is little danger of a Court exceeding this limit of its jurisdiction; but where it is empowered by statute to decide on a case stated by another authority, there is more risk of its passing from the concrete to the abstract. The 48th section of the Land Law (Ireland) Act, 1881, which confers the jurisdiction we are now asked to exercise, requires the case to be stated in respect

of a question of law arising in a proceeding pending before the Land Commission. Of course this can only mean a question relevant to and affecting the result of the proceeding; and where the case not only fails to show such relevancy, but conveys that the object of submitting the question is to obtain a decision for general guidance, I am of opinion that it ought not to be entertained.

I hope, however, that in saying this, I shall not be misunderstood. I am not one of these who think it expedient to deal with every case that comes before a Court as if it only concerned the parties to it; and to decide it, if possible, upon some special feature to the exclusion of questions of general interest. It has not been thus that English law has been brought to a degree of certainty and uniformity which, amid the complex problems of modern civilization, could not have been attained by the most skilful codification. Our law reports have served for a code; and the value of the judgments therein contained depend upon the prudent courage with which legal principles are expounded. But these principles are treated in connexion with a concrete case; and the propositions formulated are pointed, limited, and controlled by the circumstances to which they are applied. Hence it is that even if our Courts were at liberty to answer purely speculative questions, it would be hardly possible to do so with advantage.

The difficulty is illustrated by the case before us. Everyone is probably ready to admit that the Land Commission would be assisted in fixing a fair rent by knowing the sum at which the holding in the landlord's hands might be expected to let from year to year to a solvent and prudent tenant: therefore this is always a legitimate subject of investigation. There are doubtless cases in which the fair rent that ought to be fixed would correspond with the sum that would be arrived at on the assumption in the question submitted to us. But, if this be so, other cases can be easily conceived in which the result of acting on the assumption would be a rent unfairly high or unfairly low. Under these circumstances, what answer can be given that would be of general application? An affirmative or negative reply would be equally misleading.

This difficulty has not, I think, escaped the notice of the

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counsel for the landlord. At least it is remarkable that their able and elaborate arguments were directed to a proposition wholly different from anything suggested by the question submitted for decision. This proposition has been stated by them in various forms of language, but I think its substance was that the fact that the holding was in the occupation of the tenant was not a circumstance to be regarded in fixing the *amount* of the fair rent. A question framed upon a requisition of this kind would be simpler and perhaps easier to answer than that with which we are dealing; but it would be equally open to the objection that it is abstract in its character. It was probably raised and discussed before the Land Commission; but I can find nothing in the judgment of Mr. Justice Meredith to lead me to think that it was decided against the landlord. Indeed the train of his reasoning, and especially his emphatic declaration against deduction in respect of occupation interest (whether conscious or unconscious, disclosed or undisclosed) seem to indicate that the fair rent was fixed upon the basis contended for by the landlord's counsel. But whether this be so, or not, it is evident that the proposition discussed in this Court is widely different from that presented in the case. We have been pressed to send the case back for amendment. Such a course has been sometimes taken for the purpose of supplying deficiencies or removing ambiguities; but it could not be justified where the question is founded on a requisition of the landlord pressed by his counsel after its ambiguity was pointed out by the Judicial Commissioner, and where the tenant has declined to take any part in either preparing or discussing the case.

There are thus, in my opinion, three grounds on which this Court ought to decline to reply to the question submitted for consideration and decision:—

1. It is not asked for the purpose of settling any matter in controversy between the actual litigants, but with the object of laying down a rule for general application.

2. Its vague and ambiguous character makes it impossible for the Court to give it an answer which would either afford guidance in the present case or assistance in future litigation.

3. The only question argued on behalf of the landlord before

this Court (where the tenant is not represented) has no resemblance to the question stated by the Land Commission at the landlord's request.

The view I take of the case rests on these grounds alone; and if other grounds have been suggested, I am not prepared to adopt them. In giving my reason for sending back the case without a decision, I have carefully avoided offering any opinion on the proposition discussed before us. Some of my observations in *The Queen* (*Gosford*) v. *The Irish Land Commission* (1) were quoted by Mr. Justice Meredith, and in the argument here. If I had cause for thinking that anything I then said has been misapprehended either by the learned Judge or even by counsel in this discussion, I should take this opportunity of making my meaning clear. But I do not think that I have been misunderstood, and there is therefore no need of explanation.

I fully concur in what Fitz Gibbon, L.J., has said as to the propriety of the Land Commission in stating this case.

Solicitor for the landlord: *Monroe.*

G. Y. D.

(1) [1899] 2 I. R. 399.

[In the Court of Appeal.]

Appeal.
1899.
Feb. 24, 25, 27.
May 16.

ADAMS, TENANT; DUNSEATH, LANDLORD (No. 2) (1).

([1899] 2 I. R. 504.)

Landlord and tenant — Land Acts, 1881-1896 — *Improvements — Increased letting value—Allowance to tenant in respect of improvement work—Balance of increased letting value.*

In fixing the fair rent of a holding, the Land Commission adopted the principle that after making a fair and liberal allowance in respect of the tenant's improvement works, the surplus or balance of increased letting value was the property of the landlord and not of the tenant, and that the landlord was entitled to have a fair rent fixed in respect of that portion of his property. Upon a special case asking the question whether the principle, so adopted by the Land Commission, was right in law:—*Held*, by the Court of Appeal (*diss.* Lord Ashbourne, C., Porter, M.R., and Holmes, L.J.), that the question should be answered in the negative, the majority of the Court concurring in formulating the following propositions:—

1. That in fixing the fair rent of the holding the tenant was entitled, in respect of the present capital value of his improvement works, to such return by way of annual allowance as the Land Commission should determine to be fair, and sufficient to satisfy the provisions of the Land Law (Ireland) Act, 1881, section 8, sub-section 9.

2. That if the allowance so made was measured by way of percentage, merely upon the present capital value of the tenant's improvement works, or of his expenditure in moneys numbered, labour, and skill, and if, after the allowance so made, any surplus or balance of increased letting value due to his improvements remained, the Land Commission was bound to have regard in dealing with such surplus or balance to the matters hereinafter mentioned.

3. That in fixing the fair rent of the holding, and in dealing with the surplus or balance aforesaid, the Land Commission was bound to have regard

(1) Before LORD ASHBOURNE, C., SIR P. O'BRIEN, L.C.J., PORTER, M.R., PALLES, C.B., FITZ GIBBON, WALKER, and HOLMES, L.JJ.

This Appeal was as a fact entitled *Martha Smyth, Committee of the fortune and estate of Margaret Dunseath, a lunatic, Landlord; David Adams, Tenant*; but, for uniformity, the name under which the case is reported in the Court below is retained.

to the interest of the landlord and tenant respectively, and to consider all the circumstances of the case, holding, and district, including the amount of such surplus or balance, and the sources from which the same was derived; treating the latent or dormant resources of the soil, as let by the landlord to the tenant, as the property of the landlord, and treating the development of those resources by the improvement, as the act of the tenant.

4. That it was within the exclusive jurisdiction of the Land Commission, having due regard to the foregoing principles, to consider and determine whether, and in what proportions, the said surplus or balance should be divided between the landlord and the tenant in fixing the fair rent of the holding.

Per Lord Ashbourne, C., Porter, M.R., and Holmes, L.J., that the principle adopted by the Land Commission was correct, and that the question submitted should be answered in the affirmative.

APPEAL by way of case stated from the decision of the Irish Land Commission already reported (1).

The case was stated in the following terms:—

"On the 10th day of October, 1896, the tenant in this case served the landlord with an originating notice of an application to the Court of the Land Commission to fix a fair rent for his holding, payable during a second statutory term. We refer to this notice which bears date the 16th day of September, 1896.

"It describes the lands as the lands of Kildowney, in the county of Antrim, and Poor Law Union of Ballymena. The other particulars as to the holding stated in the originating notice are as follows:—

"1.	Area in statute measure, .	42A. 1R. 5P.
	Rent of holding, . .	£32 15*s.* 0*d.*
	Gross Poor Law valuation, .	£24 15*s.* 0*d.*

"2. The application came on to be heard before a Sub-Commission sitting at Ballymena, duly delegated and authorised to decide the case. The Sub-Commission made an order bearing date the 7th day of April, 1897, to which we refer, fixing the judicial rent of the holding for the second statutory term of 15 years (commencing from the 1st December, 1896), at £17.

"3. In the schedule to their order, prepared and recorded by the Sub-Commission, under the provisions of section 1 of the Land

(1) [1898] 2 I. R. 709.

Appeal. 1899. ADAMS, *Tenant;* DUNSEATH, *Landlord.*

Law (Ireland) Act, 1896 (to which schedule we refer), the Sub-Commission (among other things) set forth that 16 acres of the holding had been reclaimed by the tenant at a cost of £6 per acre, that the present capital value of the aforesaid tenant's improvement was £144, the increased letting value due thereto £7 4*s.*, and the deduction from the rent on account of such improvements £6.

"4. By notice bearing date the 26th day of May, 1897, to which we refer, the landlord stated that he was aggrieved by the said order, and required the case to be reheard before three Land Commissioners sitting together.

"5. Accordingly the case was reheard before Mr. Justice Bewley, Mr. Commissioner Wrench, and Mr. Commissioner Fitz Gerald, Q.C., in Belfast, on the 3rd day of December, 1897.

"6. Mr. Justice Bewley having resigned the office of Judicial Commissioner before the judgment of the Court on such rehearing had been pronounced, and Mr. Justice Meredith having been appointed Judicial Commissioner, the case was, by consent of the parties, re-argued before Mr. Justice Meredith, Mr. Commissioner Wrench, and Mr. Commissioner Fitz Gerald, Q.C.

"7. On the hearing it was admitted that the holding is subject to the Ulster Tenant-right Custom.

"8. The question of law argued before us, and with which this case is conversant, arose in relation to the reclamation of certain portions of the holding, and the respective rights of the landlord and tenant in the increased letting value arising from such reclamation.

"9. Mr. Serjeant Dodd and Mr. Greer, on behalf of the tenant, argued that the tenant was entitled to a deduction or allowance equivalent to the entire estimated amount of the increased letting value inasmuch as (Counsel contended) such estimated amount would represent no more than a fair return to the tenant in the present case for the work he had executed. Moreover, the Ulster Custom applied, and on an estate where the custom prevails the landlord (Counsel contended), at any rate in early times, never sought to exact anything from the tenant in respect of the labour or capital expended by him. For these reasons (Counsel contended) no question in the present case could arise with reference

to any surplus or balance of increased letting value. But even assuming that a fair and proper return by way of annual allowance to the tenant should be measured at a sum less than the entire increased letting value, the tenant (Counsel contended) had, under the authority of the former case of *Adams* v. *Dunseath* (1), irrespective of, and apart from, the Ulster Custom, an interest over and above the allowance so made to him in respect of the improvement he had effected, which, it was argued, would be more than sufficient to absorb any balance of increased letting value that might remain.

"Mr. Matheson and Mr. Caruth, on behalf of the landlord, contended that the former case of *Adams* v. *Dunseath* (1) established that the only allowance or deduction in respect of improvements to which a tenant was entitled when fixing a fair rent for the holding was an allowance or deduction equivalent to a fair rate of interest upon the original cost of his improvement works, so far as the original value existed at the time of fixing a fair rent. *Adams* v. *Dunseath* (1) (Counsel contended) decided that the term "improvements" in section 8, sub-sect. 9 of the Act of 1881 must receive the definition given to the term in the Act of 1870, and that the only improvements in respect of which the tenant could claim exemption from rent, or an allowance or deduction in fixing a fair rent, were the same improvements for which he would be entitled to claim compensation on quitting his holding; accordingly that such exemption allowance or deduction should not exceed a fair percentage on the original cost of the improvement works.

"Any division of the surplus or balance of increased letting value between the landlord and tenant, or any further allowance to the tenant in respect of his improvements, or any other deduction from, or diminution of, what would otherwise be the fair rent of the holding would (it was contended) be contrary to the Land Acts.

"The existence of the Ulster Custom (it was contended) did not affect the principles applicable to the fixing of a fair rent.

"10. We were of opinion (and stated in our judgment de-

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livered on the 26th day of July, 1898), that the rights of the landlord and tenant, under the Land Law (Ireland) Acts, and the principles upon which this Court should act in relation to the increased letting value arising from reclamation were as follows :—

"(*a*) That the tenant was entitled to a fair, and even a liberal, return by way of annual allowance in respect of the present capital value of his improvement works.

"(*b*) That in ascertaining that capital value and measuring that allowance regard must be had not merely to the expenditure of the tenant in moneys numbered, or labour, but to the skill of the tenant employed in the development of the latent or dormant resources of the soil.

"(*c*) That any surplus or balance of increased letting value remaining after the allowance so made could not be divided between landlord and tenant, but was the property of the landlord, and that the landlord was entitled to have a fair rent fixed in respect of that portion of his property in the same manner, and upon the same principles, in which and upon which the fair rent was fixed by the Court in respect of those portions of the holding as to which no question of improvement arose.

"We were further of opinion (and so stated) that the fact that the holding was subject to the Ulster Tenant-right Custom did not alter the rights of the parties.

"11. Acting on the principles as laid down by us we considered and decided in the present case :—

"(*a*) That the tenant or his predecessors in title had reclaimed from waste land portion of the holding amounting in all to 16 statute acres.

"(*b*) That the present capital value of the improvements made by the tenant or his predecessors in title in effecting such reclamation was £96.

"(*c*) That the letting value of the 16 acres was increased by the reclamation to the extent of £6 15*s.* per annum.

"(*d*) That the sum of £4 16*s.* per annum, being at the rate of £5 per cent. per annum upon £96, represented and was a fair and liberal return to be made to the tenant by way of annual allowance during the second statutory term in respect of the present capital value of the improvements effected by him as aforesaid.

"(*e*) That the landlord was entitled to the surplus of balance of increased letting value (amounting to £1 19*s.*), being the difference between the above-mentioned sums of £4 16*s.* and £6 15*s.* as part of the fair rent of the holding.

"12. We were accordingly of opinion that the sum of £4 16*s.* should be deducted from the annual sum, which in pursuance of section 1, sub-sect. 1 (*a*) of the Land Law (Ireland) Act, 1896, we were of opinion should be ascertained and recorded in the schedule to our order, as the annual sum which should be the fair rent of the holding, on the assumption that all improvements thereon were made or acquired by the landlord, and that the fair rent of the holding should be fixed at the sum of £19 2*s.*

"On the application of Counsel for the tenant we agreed to state the present case for the consideration and determination of Her Majesty's Court of Appeal in Ireland.

"The question submitted for such consideration and determination is:—

"Whether, upon the facts stated in the case, the principles laid down by the Land Commission in reference to the increased letting value arising from the reclamation of the 16 acres, and the mode of dealing with same in fixing a fair rent of the holding were correct in point of law."

Serjeant Dodd and *T. M. Healy* (with them *E. Greer*), for the tenant (appellant).

Campbell, Q.C., and *Matheson, Q.C.* (with them *Caruth*), for the landlord (respondent).

Cur. adv. vult.

May 16.

LORD ASHBOURNE, C.:—

This case comes before us on a question submitted for our consideration by the Land Commission.

The facts are few and simple. The area of the holding was 42A. 1R. 5P. statute measure; the rent was £32 15*s.*, and the gross Poor Law valuation was £24 15*s.* The case came before a Sub-Commission to fix a fair rent for the second statutory term, and they fixed the fair rent at £17. In the schedule to their order the Sub-Commission (amongst other things) set forth that 16A. of

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the holding had been reclaimed by the tenant at a cost of £6 an acre; that the present capital value of the aforesaid tenant's improvement was £144; that the increased letting value due thereto was £7 14*s.*, and the deduction from the rent on account of such improvement was £6, which represented 5 per cent. upon the estimated cost of reclamation. The balance or surplus of the increased letting value after the deduction the Sub-Commission divided equally between the landlord and the tenant.

The parties being dissatisfied brought the case by way of appeal before the Land Commission, and the questions mainly discussed were whether the Sub-Commission were right in principle in so dividing the balance or surplus of increased letting value equally between the landlord and tenant; if not, how that balance or surplus should be dealt with, and how far, if at all, the Ulster Custom affected the result.

I think it right to say at once that I do not think any evidence appears in the case, as presented to us, which would indicate that the Ulster Custom would vary the result, assuming the decision to be otherwise right.

It will also tend to simplify the case if I further state that this Court has nothing to say to the amount allowed for improvements or the rate per cent. upon the estimated cost of reclamation. That is a matter wholly for the Land Commission, and we must assume that they exercised their discretion on the subject with due consideration. This leaves clear the important question of principle which came before the Land Commission.

Mr. Justice Meredith, in giving judgment, said:—

> "The Court found as a fact that portion of the land comprised in the several holdings had been reclaimed by the tenants or their predecessors in title, and that the letting value of the portion so reclaimed had been thereby increased. The method employed by the Sub-Commissioners appears to have been as follows:—After deducting from the increased letting value a sum equivalent to 5 per cent. on the estimated cost, they have divided the surplus or balance of increased letting value equally between the landlord and tenant. The Sub-Commissioners have not stated in express terms that the deduction from the rent has been arrived at in this way; but I think it is obvious from a consideration of the figures that this has been the course adopted. In my opinion the Sub-Commissioners were wrong in principle. The con-

clusion I have arrived at as to the rights of the landlord and tenant in cases like the present is as follows:—The tenant is entitled to a fair and even a liberal return, by way of annual allowance, in respect of the present capital value of his improvement work. In ascertaining that capital value and measuring that allowance regard must be had not merely to the expenditure of the tenant in moneys numbered, or labour (which is money's worth), but the skill of the tenant employed in the development of the latent or dormant resources of the soil. If the amount of the increased letting value does not exceed the amount of the annual allowance to the tenant, measured in the way I have indicated, the tenant absorbs and is entitled to the entire of the increased letting value. Of course the allowance to the tenant never can exceed the entire amount of the increased letting value; but if, after a fair and liberal allowance has been made in respect of the tenant's improvement works, any surplus or balance of increased letting value remains, that surplus or balance, in my opinion, is the property of the landlord, and he is entitled to have a fair rent fixed in respect of that portion of his property in precisely the same manner, and upon the identical principles, in which and upon which a fair rent is fixed by this Court, in respect of those portions of his arable or pasture lands, as to which no question of improvement arises. I can find no reason and no justification for the allocation of this portion of the landlord's property between him and the tenant."

The case of *Adams* v. *Dunseath* (1) clearly laid it down that "improvement" meant "improvement works," and did not mean "increased letting value." I can find nothing in that decision inconsistent with the judgment of Mr. Justice Meredith. In *Adams* v. *Dunseath* (1) it was clearly recognized that after the tenant had been fully and thoroughly protected in "the enjoyment of a just and even of an ample return in respect of the present value of the additional capital, which his improvements have added to the holding," there may remain some surplus or balance of the increased letting value. Several members of the Court of Appeal in my opinion also decided that that surplus or balance must be dealt with under sub-section 1 of section 8 of the Act of 1881, that is, that a fair rent should be fixed in respect of it, "having regard to the interest of the landlord and tenant respectively, and considering all the circumstances of the case, holding, and district." Lord Justice Fitz Gibbon in his judgment pointed out:—

"Thus far, however, our unanimous statement of the rule appears to

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me to lead—that the landlord is entitled, as part of the fair rent of the holding, to so much of any increase of letting value consequent upon improvements, after making a fair return to the tenant upon the value of the improving works, as is derived from the utilization of the landlord's interest in the inherent qualities, advantages, and resources of the holding."

Lord Chancellor Law had previously given his view :—

"In my opinion, therefore, the negative provision contained in sub-section 9 of the fair rent clause (section 8) of the Act of 1881, that no rent shall be allowed or made payable in respect of tenant's improvements secures against the imposition of any rent only the improvement works; that is, their yearly value, leaving any increased yearly value beyond that to be dealt with under the earlier part of section 8 as may under the circumstances of the case be considered just and fair between the parties."

Sir E. Sullivan, M.R., also said that after allowing the tenant a fair percentage or yearly allowance for his expenditure, the remainder of the increased letting value "should be dealt with by the Commissioners under the early part of the 8th section of the Act of 1881 with due regard to the interest of the landlord and tenant respectively." Although there are some reservations of opinion, I can find in the decision no warrant for dividing the surplus or balance between landlord and tenant, which would practically exempt the tenant from all rent in respect of the moiety allotted to him.

I am in fine unable to find in the decision of *Adams* v. *Dunseath* (1) any real support for the argument of the appellant in the present case.

The Land Law (Ireland) Act, 1896, states with precision the duty of the Land Commission in assessing the fair rent of a holding. Sub-section 9 of section 1 is as follows :—"In assessing the fair rent of any holding no deduction shall be made, except such deductions as shall be specified and accounted for in the said schedule, and are in accordance with the provisions of the Land Law Acts." The schedule was set out in an appendix of the Act; and a new form has been prescribed by the Land Commission. This schedule is commonly called "the Pink Schedule," and its terms are of high importance, as therein must be specified and accounted for all deductions from the gross fair rent.

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The portion of the Pink Schedule appropriate to the present controversy is:—"(7) State the improvements in the holding made wholly or partly by the tenant or at his cost." Then follow columns headed—"nature and character of each such improvement"—"present capital value"—"increased letting value due thereto"—"date when made as near as can be ascertained"—"extent (if any) to which the landlord has paid or compensated the tenant in respect of each such improvement"—"deduction from the rent on account of each such improvement."

The duty of the Land Commission is thus found to be to ascertain the gross fair rent on the prescribed presumption, and to measure the amount of the deduction on account of each improvement. What is not deducted will, in the language of Lord Chancellor Law, be dealt with under sub-section 1 of section 8 of the Act of 1881, "having regard to the interest of the landlord and tenant respectively, and the circumstances of the case, holding, and district."

We have nothing to say, as I have already mentioned, to the amount of deduction or the rate of allowance; but being of opinion that the Land Commission have measured the amount which should, in their opinion, be allowed on account of the improvements made by the tenant, I can see nothing to indicate that they have proceeded on any erroneous principle.

In my opinion the question submitted by the Land Commission should be answered in the affirmative.

SIR P. O'BRIEN, L.C.J.:—

A judgment embodying the concurrent opinions of the Lord Chief Baron, Lord Justice Fitz Gibbon, Lord Justice Walker, and myself, has been prepared by us in conference, and the Lord Chief Baron has kindly undertaken to read this judgment after the Master of the Rolls has delivered his judgment.

We have also formulated in conference the answer that should be given to the question proposed in the special case. As we think it desirable not to multiply judgments, but that there should be but one judgment to which the Land Commission may hereafter refer for guidance, we will not individually add anything to the written judgment.

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PORTER, M.R. :—

By the common law any improvement of the sort now in question was and is the property of the owner of the land. It forms part of it just as a tree, or a quarry, or a natural water-course. Apart from any local custom controlling or modifying the common law, a tenant of an agricultural holding had no property or interest in houses, drains, reclamations, or the like, even when made altogether by himself, except as part of the holding; and if he was tenant at will or from year to year the determination of his tenancy deprived him of all that formed part of it. I am not speaking at present of any tenant-right question. The Act of 1870, called by Mr. Donnell the Magna Charta of the tenant farmers, altered this; not by giving to the tenant any property in improvements made by himself, but by conferring on him an interest in them in the nature of a right to compensation on quitting his holding. That is, if the improvement was, say, a house, the tenant could not pull down the house and remove the materials, but he could recover from his landlord compensation in respect of it within certain limits. This (though owing to the limit as to amount and otherwise not wholly adequate), was a great boon to improving tenants. The improvements, however, whether the tenant quitted the holding by his own act or through that of the landlord, formed as before an integral portion of the holding, and did not save the tenant from eviction or from liability to pay rent in respect of the holding in its improved state.

Section 70 defines improvements as used in the Act, and of course in section 4, as :—

Any work which being executed adds to the letting value of the holding on which it is executed, and is suitable to such holding; also—

Tillages, manure, or other like farming works, the benefit of which is unexhausted at the time of the tenant quitting his holding.

There is no other definition of "improvements," so far as I am aware, in any of the Land Acts.

We come then to the Act of 1881. By section 8, sub-section 9 it is enacted :—"No rent shall be allowed or made payable in any proceedings under this Act in respect of improvements made by

the tenant or his predecessors in title, and for which, in the opinion of the Court, the tenant or his predecessors in title shall not have been paid or otherwise compensated by the landlord or his predecessors in title."

Thus, whilst under the Act of 1870 the tenant was only secured a limited compensation for improvements on quitting his holding, under the Act of 1881 he is totally exempted from being charged any rent in respect of them whilst he holds the land at a "fair rent" under statutory conditions—and that of course is practically in perpetuity. If he is unable to obtain a fair rent, or from any reason quits his holding, he is still entitled to rely on the 4th section of the Act of 1870; but of course since the passing of the Act of 1881 it will seldom be resorted to.

There is no definition of "improvements" in the Act of 1881. But expressions not defined by it must have the same meaning as the same expressions in the Act of 1870—both statutes being in *pari materia*—as was decided in *Adams* v. *Dunseath* (1). Indeed the Purchase of Land Act, 1885, contains provision to that effect—section 26, and it refers to and supplements the Act of 1881. This proposition cannot be questioned—certainly was not questioned before us.

If then no different meaning is to be put upon the word "improvements" in the later Act from that which it bore in the Act of 1870, the section means no more than that in ascertaining the fair rent of a holding, whilst the entire holding as it stands is to be valued, no rent is to be made payable in respect of any improvement (of the defined sort), that is, of any such improvement work made by the tenant or his predecessors. This insures to the tenant that so long as his tenancy lasts and so long as the improvement works remain, be they farm buildings, fences, or what they may, he is saved from having to pay rent on what he has already paid for. He has no longer to lose his expenditure altogether, as was the case at the common law. He has no longer to wait till the termination of his tenancy to be recouped for his outlay, lying out of it, or worse, in the meantime, as under the Act of 1870. Having spent his money on improvements, he acquires under the Act of 1881 the

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right to remain on in perpetuity if he choose, and, under this section, immunity from rent upon or in respect of all improvement works effected by him. This was an enormous boon to the tenant. In my opinion the Act gives him this, and nothing more. It says not a syllable about improvability or inherent capabilities of the soil, unearned increment, or anything of the sort. It deals with improvements in the sense of works and nothing else. What the tenant contends for here is that besides such deduction from the rent as represented the works themselves, he is entitled further to exemption from rent upon the increased letting value of the holding brought about by his works of improvement. I see nothing in the Act to justify this contention. The law on this subject remains as it always was, except so far as it is altered by the Land Acts. In my opinion it is clear that there is nothing in the Act of 1881 to give to the tenant any interest in the holding itself or any works or improvements upon it further than the Act expresses; and in this respect I think the Act, while it indemnifies the tenant, does not give him any right such as is claimed. Under the Act it is I think the duty of the Land Commission, when fixing a fair rent, to value the holding; to value the tenant's improvements in the sense of the improvement works made by the tenant; and from the rent to deduct such annual sum as will fairly represent the tenant's interest in the improvements. Whether this is called a percentage or not I care not, if it be a fixed and reasonable annual sum as ascertained in relation to the capital value of the works.

Sullivan, M.R., says (p. 137) in *Adams* v. *Dunseath* (1) :—

> " 'Improvements' does not and cannot mean the increased letting value of the holding caused by the making of the improvements: but simply the works which have caused that increase, or rather the interest of the tenant who made them, measured by the money expended on them, as declared and limited by the said two Acts."

In that case five questions were submitted for the judgment of the Court of Appeal. The Court in lieu of them substituted six others which they considered more properly fitted to raise the real questions in the case. Neither in any of the five, nor in any of

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the substituted six, was the present question directly raised. The first of the latter (1, what is the meaning of the word "improvements," &c.) elicited the unanimous opinion of the Judges, that in the Act of 1881 it means the same thing as in the Act of 1870. Law, C., says (pp. 119, 120):—

> "In my opinion, therefore, the negative provision contained in sub-section 9 of the fair rent clause (section 8) of the Act of 1881, that 'No rent shall be allowed or made payable in respect of tenants' improvements,' secures against the imposition of any rent only the improvement works, that is, their yearly value, leaving any increased yearly value beyond that to be dealt with under the earlier part of section 8, as may under all the circumstances of the case be considered just and fair between the parties. For it should be observed that though the absolute prohibition of charging rent contained in this 9th sub-section is thus limited, it by no means follows that rent is to be charged on all outside the scope of the prohibition. That is a matter for the Commissioners in the exercise of their discretion, and having regard to what may appear to them to be just and right."

May, C.J., says (p. 131) to the same effect that:—

> "The term being impressed with this definite meaning, it seems to me that the operation of this 9th sub-section will be confined within somewhat narrow limits. The sub-section enacts that no rent shall be allowed or payable in respect of any improvement created by the tenant or his predecessors in title. In the case of the erection of a house, or any structure having an existence separate from the lands, this language is of easy application, and seems simply to mean that the holding shall be valued irrespective of such structure.
>
> "But in the case of drains and other works of reclamation or improvements of that nature, it would seem that the language of the sub-section is not appropriate. It seems that rent could hardly be claimed in respect of a drain, or in respect of an embankment made for the purpose of reclamation, or any similar work. The improvement work in such cases possesses in itself little or no annual value, and the increased value which it may confer on the adjoining land is not an improvement in its statutory sense; nor does it appear to me that the expenditure of money or labour in the construction of such a work can be regarded as an "improvement"; such expenditure or labour could not be registered under the 6th section of the Act of 1870. It appears to me that improvements of this class do not fall within the operation of this 9th sub-section; but this result would not be prejudicial to the tenant. Such expenditure would, I think, constitute one of the circumstances of the case to be considered by the Commissioners in fixing a

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fair rent. But in what manner such a circumstance should be had regard to, or by what process the rights or interests of the landlord and tenant respectively in the holding should be ascertained, is not, I think, a matter of law on which this Court is called upon to express any opinion—rather a matter of valuation to be entertained by an intelligent tribunal."

Sullivan, M.R. (pp. 137, 138), says:—

"We are not left to speculate on this matter; for the very word is the subject of express definition in the Act of 1870, the 70th section thereof defining improvements as follows:—'Any work which being executed adds to the letting value of the holding on which it is executed, and is suitable to such holding'; and the 57th section of the Act of 1881 directs that Act and the Act of 1870 to be construed together as one Act; which in itself would, I think, be sufficient to show the true meaning of the word improvements in the 9th sub-section of the 8th section of the Act of 1881, . . . any words or expressions therein which are not thereby defined, and are defined in the Act of 1870, shall, unless there be something in the context repugnant thereto, have the same meaning as in the Act of 1870, except so far as the same is expressly altered or varied, or is inconsistent therewith. The conclusion on this very important matter which seems to have been adopted by two of the learned Commissioners, Mr. Justice O'Hagan and Mr. Commissioner Litton, is, in my mind, erroneous. An interpretation of the 9th sub-section in question, which would make the term improvements therein mean the whole increase of letting value, involves consequences so large and startling that one testing the construction of the statutes is at once disposed to think some error must exist; for as a tenant on quitting his holding would only be entitled at the utmost to the value of the expenditure on the work that caused the increase of letting value, he, remaining in his holding and claiming to have a fair rent determined, would on such an interpretation be entitled to have awarded to him as his own property, as against the landlord, the whole increase of letting value caused by his expenditure. For instance, a tenant paying a rent of £100 a-year for his holding during his tenancy may spend £500 in executing works in the nature of permanent improvements, causing an increase of the letting value of his holding of £100 a-year at the time he quits. The utmost he could get on quitting his holding, under the Act of 1870, even as amended by the Act of 1881, would be £500, and that sum may be capable of being reduced to a lower point; while, though not quitting, and a still abiding tenant, with all the advantages of the judicial term and rent, the Commissioners would have to allow to him the whole £100 a-year which has been produced by the joint aid of his money, and the soil he has had in tenancy from his landlord. This,

I think, cannot be. The two Acts seem to me entirely opposed to such a conclusion. I can find nothing in the statute of 1881 to show that such a change in the position of the tenant and landlord was ever contemplated; on the contrary, the sub-section itself stands strongly opposed to such a construction. By its very language, the test as to whether no rent is to be allowed in respect of improvements, is whether they have or have not been paid for or otherwise compensated by the landlord. What is the landlord to pay for or otherwise compensate? Surely not the whole increased yearly letting value added by the making of the improvements, but at the utmost the amount of money expended by the tenant in making the same."

Morris, C.J. (p. 146), says:—

"First, with respect to the word 'improvements.' It appears to have been used and dealt with as of the same signification as the 'increased letting value,' caused by the improvements.

"The word is defined in the Act of 1870 as 'any work which, being executed, adds to the letting value of the holding, &c.,' but the addition to the letting value is caused by the work, plus the inherent qualities and capacity for such work of the holding—the latter is the landlord's, while the former is the tenant's."

Palles, C.B., treats the definition of improvements as a matter of course (see p. 154).

Deasy, L.J. (p. 174), says:—

"By this section the tenant gets the right to enjoy them for the statutable period without being charged any rent for them. That may be politic, wise, and just, and I do not question its policy, its wisdom, or its justice. But I think that such a great change in the law, involving such serious consequences, ought not to be extended by construction beyond the legal signification of the words used by the Legislature in effecting it. It ought not to be extended to cases not included in its terms, merely by inferences from another clause dealing with another subject-matter, and which is not referred to in it directly or indirectly."

Fitz Gibbon, L.J. (p. 180), says:—

"Thus far, however, our unanimous statement of the rule appears to me to lead—the landlord is entitled, as part of the fair rent of the holding, to so much of any increase of letting value consequent upon improvements, after making a fair return to the tenant upon the value of the improving works, as is derived from the utilisation of the landlord's interest in the inherent qualities, advantages, and resources of the holding."

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These statements, though perhaps only *dicta*, and not directly arising in the case of *Adams* v. *Dunseath* (1) are of course entitled to great weight; but from them all I gather that if the question of increased letting value arose it could not be dealt with by this Court under sect. 8, sub-sect. 9 at all, but could only be considered if at all under the clauses, particularly sect. 8, sub-sect. 1, dealing with the fair rent of the holding. Under that clause, I do not question that it would be open to the Land Commission to consider it as one of the "circumstances of the holding," when having regard to the interests of the landlord and tenant respectively; in other words, that the Land Commission may, in fixing a fair rent of the holding, with all the improvement works upon it, discriminate between the case of an improving tenant and that of one who has not improved or even has deteriorated his holding, or between one tenant who has shown skill in planning and carrying out the improvements and another who has not. But they must be like every other element of fair rent, the subject of skilled and experienced examination, consideration, and appraisement. The increased letting value is the landlord's. It is a part of the holding which is his. But the holding in its entirety is subject to the jurisdiction of the Land Commission in fixing a fair rent.

If this be correct, has the law been changed by the Act of 1896? I think it very clear that it has not. The words relied on as showing that it has are in sect. 1, sub-sect. (1) (*c*) (i), "and the increased letting value due thereto." Now this first sub-sect. contains directions as to the particulars to be placed in the schedule prescribed by the Act. These particulars are numerous and detailed. "The improvements made" must be and are the same as those in the previous Act, save so far as they are expressly altered. The scope of the word "improvements" *is* altered by sub-section (3):—"No rent shall be allowed or made payable in respect of an improvement made by the tenant on a holding by reason only of the work constituting such improvement not being suitable to the holding." If, then, the Legislature had meant to alter the law, and to extend the definition so as to include not alone improvement works, but

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also increased letting value consequent thereon, we should have found it so stated. "No rent shall be allowed in respect of such increased letting value," just as "no rent shall be allowed in respect of an improvement work made by the tenant by reason only of the work constituting the improvement not being suitable to the holding." The section down to the end of sub-section (1) was apparently designed to require precision, so that the Land Commission shall have to go into much detail for the satisfaction of the parties. The annual value representing a fair rent, on the assumption that all the improvements had been made or acquired by the landlord, is first to be ascertained, or at least is to be first written down on the schedule; though that will not be the fair rent, and affords no argument in favour of the landlord founded upon that assumption. The nature, character, and present capital value of the improvements made wholly or partly by the tenant is to be ascertained. Having ascertained the capital value, the Commission is also to ascertain the increased letting value due thereto: a very natural, and in any view a very useful requirement; for if the capital value of an improvement, for instance a house, was, say, £250, and the increased letting value derived from it is, say, only, £7 per annum, it would or might be desirable to have that fact ascertained, either in reference to the improvement, or to the question of fair rent of the holding. No one ever heard of great and important rights being conferred by statute under a section defining what particulars were to be put in a schedule.

I do not think this Act alters the law in this particular.

In the present case the Land Commission has allowed the tenant what is described as a fair and liberal return in respect of the capital value of the improvements. We cannot go behind that statement or differ from it unless we decide that its assessment was wrong in principle. The only way we could do that would be by deciding as matter of law that the tenant was entitled in respect of improvements—that is improvement works—to claim for increased letting value: that is, first for the improvements, and over and above that for increased letting value. The latter, in my opinion, is outside the enactments with which we are immediately concerned, and can only be taken into account in the way I have

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already said, that is in fixing a fair rent of the holding as one entire thing which belongs to the landlord, subject to the tenancy with all its incidents.

I must add a word about the question of the Ulster Custom, to which it is found the holding is subject. If the Land Commission meant to decide that as matter of law the Ulster Custom could not apply to such a case, I should have required more argument than I have heard to convince me that that was so. It may be that such a custom might exist, and it might conceivably be lawful; though in the course of my experience of such cases I never heard of the question of increased letting value being imported or alleged to be imported into the question of tenants' improvements. Under the custom, the tenants were only too happy if they were not called on to pay rent for the works of improvement themselves, without going into any question of enhanced letting value beyond that. I only say this to guard myself in the matter; because I do not read the case as stating or suggesting that any custom applied to the particular holding other than that which prevailed generally throughout the province; and under the custom in its widest form, it could not be successfully contended that it would govern the present case; at any rate the case does not find anything about the incidents of the custom applicable to the case, or that it could in any way affect the question.

I am of opinion that the grounds upon which the Land Commission proceeded were correct, and that the question with which the case concluded should be answered in the affirmative.

PALLES, C.B.:—

This is the judgment of the Lord Chief Justice, Lord Justice Fitz Gibbon, Lord Justice Walker, and myself.

The question submitted to us is, "Whether, upon the facts stated in the case, the principles laid down by the Land Commission in reference to the increased letting value arising from the reclamation of the 16 acres, and *the mode of dealing with same in fixing a fair rent of the holding*, were correct in point of law?"

So far as this question relates to "the principles" involved, the matter is one of law, and therefore has been properly reserved for

us: but if, by the introduction into the question of "the mode of dealing with same," we are invited to consider the propriety of the manner by which, in moneys numbered, those principles have been applied in this particular case—indeed unless we are to exclude these latter words as surplusage—the question involves matter of fact which we are not permitted to consider. We call attention to this, because it is specifically stated in the case that the return to be allowed to the tenant, by way of annual allowance in respect of the present capital value of his improvement, was calculated at the rate of 5 per cent. per annum on the capital sum of £96; and we need not say that all considerations in relation to amount of the capital value or the rate of the allowance is outside our jurisdiction. We have no doubt that the Land Commission did not intend to include in their question the consideration of value or rate; and we mention the matter merely *ex abundanti cautela*, to prevent any possibility of future misinterpretation of our view.

We come, then, to the consideration of the principles applicable to a holding which is not subject to the Ulster Tenant-right Custom, reserving till later on the consideration of the separate question, whether the principles are the same in reference to a holding which is subject to that custom.

The principles upon which the Commission proceeded are thus stated:—

"(*a*). That the tenant was entitled to a fair, and even a liberal return, by way of annual allowance, in respect of the present capital value of his improvement works.

"(*b*). That in ascertaining that capital value and measuring that allowance, regard must be had not merely to the expenditure of the tenant in moneys numbered or labour, but to the skill of the tenant employed in the development of the latent or dormant resources of the soil.

"(*c*). That any surplus or balance of increased letting value remaining after the allowance so made, could not be divided between landlord and tenant, but was the property of the landlord; and that the landlord was entitled to have a fair rent fixed, in respect of that portion of his property, in the same manner and upon the same principles in which and upon which the fair rent

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was fixed by the Court in respect of those portions of the holding as to which no question of improvement arose."

These latter words we understand to mean "as if the improvements had been made or acquired by the landlord."

There may possibly be some vagueness upon the words of the case as to the elements which were taken into consideration in fixing "the fair return by way of annual allowance which the tenant was entitled to"; but we gather from the judgment of Mr. Justice Meredith, and from the statement of counsel on both sides during the argument here, that that allowance was confined to the tenant's interest under sub-section 9 of section 8 of the Act of 1881 in the improvements, in respect of which interest it was thereby directed that no rent should be allowed or made payable. Taking the proposition in this sense, the word "liberal" in sentence (*a*), although it is taken from more than one of the judgments in *Adams* v. *Dunseath* (1), cannot carry with it any force or effect. It must either be used as merely synonymous with "fair" (which, according to our language, it is not), or by reason of its use it is implied that the amount of the allowance may be increased beyond that which would be arrived at, were "fair" the only word used; and we hold that the tenant is entitled, under sub-section 9 of section 8, to nothing more than a "fair" allowance.

Passing from this, which rather partakes of a verbal criticism, we come to the main question for determination. Are the Commission, in every case, and irrespective of the amount of the increased letting value due to a tenant's improvements, without jurisdiction to allow to such tenant, in respect of those improvements, any greater amount than the sum ascertained according to the principles laid down in sentence (*a*), viz. an allowance in respect of the capital value of that which, by sub-section 9, sect. 8, is exempted from rent? To determine this, we must first ascertain critically the exact matters which were decided in *Adams* v. *Dunseath* (1). Of the questions formulated there by the Court, two only, viz. the first and third, are germane to the present case. (1), What is the meaning of the word "improvements" in the

(1) 10 L. R. I. 109.

9th sub-section of sect. 8 of the Land Law Act, 1881? (3), Are the provisions of the final paragraph of the 4th section of the Land Act of 1870, as to a tenant claiming compensation for improvements made before the passing of that Act, applicable to such improvements, in determining what is a fair rent under the 8th section of the Act of 1881? The answers to those questions were, (1), "that the meaning of the term 'improvements' is the same as in the Landlord and Tenant Act, 1870, s. 70," and (2), "that the 3rd question should be answered in the affirmative." The legal effect of those answers is (1), that the improvements which are to be excluded from the subject-matter upon which the rent is to be ascertained consist of the *interest* of the tenant under the Act of 1870 in the "the improvement *works*," and not the increased letting value of the land due to such works; and (2), that the surplus or balance of such increased letting value, over and above such fair annual allowance as ought to be made to the tenant in respect of his improvements under sub-section 9, must be dealt with under sub-section 1 of sect. 8. The decision went no further, and the matters we have stated as having been there decided purport to form the basis of the judgment of the Land Commission on the present case. "The Court of Appeal," says Meredith, J., "decided that it"—*i.e.* the surplus or balance of the increased letting value—"must be dealt with under sub-sect. 1 of sect. 8 of the Act of 1881." Now, how is it to be so dealt with? To use the words of Mr. Justice Meredith, in which we agree, "We must fix a fair rent in respect of it, 'having regard to the interest of the landlord and tenant respectively, and considering all the circumstances of the case, holding, and district.'"

The result, then, is to be arrived at after giving effect to two separate classes of considerations, to two separate factors:—1, the "interest of the landlord and tenant respectively"; 2, "all the circumstances of the case, holding, and district." But Mr. Justice Meredith, having thus laid down this undoubtedly correct principle, as that by which he was to be governed, must now be followed closely in his application of that principle to the facts of the case. He begins by stating that—"It cannot be denied that the language used by some of the Judges of the Court of Appeal appears to indicate that even after a fair and liberal return has

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been made to the tenant in respect of his expenditure and skill in effecting improvement works, he might still be found entitled to a share of the surplus or balance of increased letting value, and consequently to a further allowance or deduction from what would otherwise be the fair rent of the holding." He proceeds then to adopt an explanation suggested by Mr. Matheson to account for the use of those expressions, and he attributes them to the Judges who used them having had in their contemplation the "problem of occupation interest." He then proceeds to point out that the Land Commission had, in a series of cases, decided that no allowance or deduction in respect of occupation interest could be made from what would otherwise be the fair rent of the holding, and that, so far as that Court was concerned, that aspect of the case was closed. He then seems to hold that it necessarily followed, as matter of law, from the tenant not being entitled to an occupation interest, that he was not entitled to any part of the surplus of the increase in the letting value due to his "improvements," over and above the allowance to which he was entitled under sub-section 9 of section 8. It will, however, be observed that this line of reasoning has for its sole basis one only of the two factors which the Legislature has directed shall be taken into consideration, viz. "the interest of the landlord and tenant respectively"; and that only so far as that interest is represented by the amount of the allowance under sub-section 9. It ignores altogether the other factor, which he himself has laid down as one which must be considered; and he thus assumes that the Land Commission were bound, in every case, to exclude from "the circumstances of the case, holding, and district," any consideration of the amount of the increase in the letting value over and above the allowance under sub-section 9.

For such an assumption no warrant can be derived from *Adams* v. *Dunseath* (1). In order to show this, I quote a passage from the judgment of each member of the Court in succession.

Law, C., says:—

> "In my opinion . . . the negative provision contained in sub-section 9 . . . secures against the imposition of any rent *only the improvement works, leaving any increased yearly value beyond that* to be dealt with

(1) 10 L. R. Ir. 109.

under the earlier part of sect. 8 as may, under all the circumstances of the case, be considered just and fair between the parties . . . Though the absolute prohibition of charging rent contained in sub-section 9 is thus limited, it by no means follows that rent is to be charged on *all outside* the scope of the prohibition. That is a matter for the Commissioners, in the exercise of their discretion, and having regard to what may appear to them to be just and right."

May, C.J., speaking of the expenditure of money or labour by the tenant in the construction of an improvement work, says :—

"Such expenditure would, I think, constitute one of the circumstances of the case to be considered by the Commissioners in fixing a fair rent. But in what manner such a circumstance should be had regard to, or by what process the rights or interests of the landlord and tenant respectively in the holding should be ascertained, is not, I think, a matter of law on which this Court is called upon to express any opinion—rather a matter of valuation to be entertained by an intelligent tribunal."

Sullivan, M.R., says (p. 137) :—

"An interpretation of sub-section 9 which would make the term 'improvements' therein mean the whole increase of letting value involves consequences so large and startling that one testing the construction of the statutes is at once disposed to think some error must exist."

He takes the instance of a tenant paying a rent of £100 a-year for his holding, and spending £500 in executing improvements, causing an increase of the letting value of £100 a-year; and he says (p. 139) :—

"In the illustration I have put, the duty of the Commissioners in determining a fair rent would be, not to allow to the tenant the whole increased letting value of £100 a year, but to assess what would be a fair percentage or yearly allowance for his expenditure, checked and qualified by the consideration of what he would get on leaving his holding; and supposing they thought £400 would be the sum payable, and that a percentage of £10 or £12 per annum was to be allowed upon it, they should leave the £40 or £48 for the tenant free from any rent in respect thereof, while the remaining £60 or £52 should be dealt with by the Commissioners under the early part of the 8th section, with due regard to the interest of the landlord and tenant respectively. These figures are only used to illustrate my meaning. All this would be for the Commissioners, acting under the principles I have indicated, and by which I think they are bound."

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Though his figures are only an "illustration," they demonstrate that Sullivan, M.R., held that making the allowance for the tenant's expenditure, which he assumed to be made in obedience to sub-section 9, did not exhaust, or fully discharge, the duty of the Land Commissioners, but that the question of his right to a further allowance, in respect of the surplus of the increase in the letting value, over and above that allowance, still remained to be dealt with by the Land Commissioners, when fixing the fair rent under the early part of sect. 8.

Morris, C. J., quotes and adopts Mr. Butt (p. 146) :—

> "If, for instance, the letting value of the farm was increased by £10 a year, . . . it may be argued that this value is created by the industry or expenditure of the tenant, and that therefore he is entitled to regard the property he has so created as his own. But . . . the additional value is not the creation solely of the tenant. It is the creation partly of the expenditure *and the skill* of the tenant, and partly of the inherent capabilities of the soil."

Morris, C.J., adds these words of his own :—

> "The consideration of the inherent capacity of the soil, in the consideration of the increased letting value caused by improvements or work done by the tenant, . . . might in many cases be the most important factor, while in other cases it might not."

Palles, C.B., says (p. 160) :—

> "I am of opinion that the word 'improvements' in the 9th sub-section means works which, being suitable to the holding, add to its letting value, as distinguished from the increased letting value itself . . . The increased letting value caused by the improvements is, no doubt, not the creation solely of the tenant. It is the result, partly of *the expenditure and skill of the tenant*, and partly of *the inherent capabilities of the soil.* Of these two elements, however, the first is supplied solely by the tenant; and the second, the inherent capabilities of the soil, is *portion of that which has been let to him* by the landlord for the term of his lease."

Deasy, L.J., says (p. 175) :—

> "With respect to the fixing of a fair rent, and the ascertainment of compensation for improvements to the tenant, I think we cannot, and ought not, to lay down any rule, or enunciate any principle which can or ought to bind the Court in the exercise of the unlimited discretion as to both subjects vested in them by Parliament."

FitzGibbon, L.J., being then the junior member of this Court, came last. Upon the first question he said (p. 177) :—

> "I have to declare my concurrence in the *unanimous judgment of this Court* upon the error which seems to pervade the whole decision of the Land Commission, arising from the confusion of the term 'improvements' with the increase of letting value consequent upon them."

He took the case of two tenants holding at the same rent, expending each the same amount of industry, skill, and money, upon drainage or reclamation. The letting value of the one holding—poor, thankless soil, or disadvantageously circumstanced—is increased by £50 a-year; while in the other case the land, from its inherent qualities or its more favourable circumstances, returns three or four times as much. The capital invested by the tenant in the improvement being in each case the same, the difference of return arising from the utilisation of advantages, or the development of resources, in which the landlord had the largest if not the whole interest, he held that when such advantages and resources were utilised and developed by the tenant, the landlord became entitled to "his fair share" of the return from them. He then said (p. 179) :—

> "In respect of the full present value of the additional capital which his improvements have added to the holding, the tenant should be scrupulously protected in the enjoyment of a just . . . return; but, after this has been provided for, the landlord is equally entitled to the return derived from the more active and profitable use of his interest in the holding. I guard myself, as the Master of the Rolls has done, from saying that the whole surplus profit belongs to the landlord. . . . Thus far, however, our unanimous statement of the rule appears to me to lead: the landlord is entitled, as part of the fair rent of the holding, to so much of any increase of letting value consequent upon improvements, *after making a fair return to the tenant upon the value of the improving works*, as is derived from the utilization of the *landlord's interest* in the inherent qualities, advantages, and resources of the holding."

We proceed, then, to do that which sect. 8 directs us to do, to "consider the circumstances of the case and holding." What are those circumstances? That the surplus increased letting value—which is one of the matters in respect of which fair rent is to be fixed—is the product of two elements: first, of the inherent capabilities of the soil, which, subject to the interest therein of the

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tenant as a tenant from year to year, is, and must be held to be, the property of the landlord; and, secondly, of the voluntary act of the tenant in advancing and expending, at his own risk, a sum of money, for which no doubt, in event, he has been compensated, but the advance of which may be considered by the Land Commission to have been, at the time it was made, to a certain extent a speculation. The expenditure might have resulted in a loss, which must have been borne wholly by the tenant. It might, and in event has proved to be a source of a considerable profit; and the question is, is the whole of that profit necessarily the landlord's? Are the Land Commission so strictly fettered that in their ascertainment of that which is fair between landlord and tenant, the principle of the common law embodied in the old maxim, "*Qui sentit onus, sentire debet et commodum*," must, as matter of law, be excluded? In our opinion they are not. It is impossible to confine the circumstances which are to be considered merely to matters of locality. All such considerations would be open under the words "circumstances of the district" standing alone. When the circumstances to be considered are extended so as to comprise those of "the case and holding," we have no authority to exclude from their purview any circumstance which falls within the words, read in their natural sense; and we hold that such a circumstance as that of the improvement having been made by the tenant plainly falls within both the letter and the spirit of the enactment.

It may be said that, by so doing, we affect the result which would have ensued from the sole consideration of "the interest of the landlord and tenant respectively"; but the words cannot otherwise have any effect or operation whatsoever. If the amount of fair rent must necessarily depend solely upon the respective interests in the holding, then the Act must be read as if it did not contain the words, "considering the circumstances of the case and holding," and it must be admitted that such a construction would be an impossible one. We must give them some effect. We hold that they enable the Land Commission, by their consideration, to modify the strictness of the rule which would have obtained, had their consideration been confined to a strict valuation of the landlord and tenant's interests, irrespective of every other circumstance. It is easy to show by examples how essential to justice was a

provision for such a modifying power. For instance, take the case of a house having been built of so good a character as not to be suitable to the holding: a house, for example, suitable to a farm worth £100 a-year is built on one worth only £40 a-year. In such a case, before the Act of 1896, the tenant would not have been entitled to any allowance under sub-sect. 9. Would it, then, have been imperative upon the Land Commission to have imposed upon him, in addition to the rent of the holding as land, the entire of the increased letting value due to the house which had been built by himself? Were they bound to fix the rent at exactly the same amount as they would have fixed it, had the house been built by the landlord? We are of opinion that each of these questions should be answered in the negative. Again, take the case of two farms, of equal extent, equal value, let at equal rents, under circumstances exactly identical. The tenant of one of these farms cultivates it, not only in a husbandlike manner, but according to the best mode which is consistent with there not being on the holding, when the rent is fixed, such unexhausted tillages or manures as would strictly come within the definition of "improvements." The cultivation of the other, whilst not actually of such a character as to amount to waste, has nearly approached that character. We all know that the letting values of those two farms not only will not be the same, but may differ widely; and is it to be said that the Land Commission are coerced to increase the rent of the first farm above that which they fix on the other, solely in consequence of the mode in which it has been cultivated? We hold that it is not. But how can the special circumstances peculiar to the two cases we have put be taken into consideration by the Land Commission, otherwise than as "circumstances of the case" or "of the holding"? Is the fact that the tenant has built a house, which is unsuitable to the holding, but which increases the letting value, a "circumstance" of that holding and of the case? Is not that house the source from which the increased letting value flows? How can it be said that the fact of its being built, and the fact of the tenant being the person by whom it was built, do not constitute "circumstances" of the holding within the meaning of sub-section 1? We find ourselves unable, upon any principles of sound

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construction, to limit the generality of the words so as to exclude such circumstances; and if they be "circumstances" when the work is not suitable to the holding, so must they also be when it is suitable.

Thus we admit the possibility of the Land Commission allowing to the tenant, in respect of an improvement, more than the value of that which he acquires under sub-section 9. We hold that an additional allowance *may* be, *not* that it *must* be made. We distinguish between the thing which the Land Commission, on the one hand, are imperatively required to allow in every case in which an improvement has caused an increased letting value as the first charge upon that increase, and that which, on the other hand, they, in their discretion, *may* allow out of the surplus in the particular case in which the increased letting value has amounted to more than the fair allowance under sub-section 9. The allowance under sub-section 9 is matter of law. It does not involve any discretion; it does not depend upon qualifying circumstances as to "case or holding." The additional possible allowance is not a matter of right. As matter of law, we can go no further than to say that the Land Commission, in their discretion, *may* allow it, if, on considering all the circumstances of the case, holding, and district, and having regard to the interest of the landlord and tenant respectively, they think it right and fair to do so. The subject-matter of the first allowance is one which, by the Act of 1881, is excluded from that in respect of which the fair rent is fixed. In other words, under that Act the Land Commission had no jurisdiction to fix a rent in respect of it. The subject-matter of the second is included in that in respect of which the fair rent was to be fixed under that Act; and the allowance, if any, in respect of it, may be arrived at by modifying the strictly legal rights of the parties, upon considerations which, in popular language, are sometimes called fair and equitable, but which, were it not for the section permitting them to be taken into consideration, could not be said to be either legal or strictly equitable, using that word in the sense in which we understand it in our jurisprudence.

For these reasons, although we hold that the inherent capabilities of the soil are the property of the landlord, subject only to the interest therein of the tenant as a tenant from year to year, we

also hold that the Land Commission are not bound, in fixing the fair rent, to give to the landlord the entire of the balance or surplus of the increased letting value due to a tenant's improvement, over and above the allowance in respect thereof made to such tenant under sub-section 9. We think that this surplus or balance ought to be dealt with by the Land Commission, with due regard to all the circumstances of the case and holding, including the circumstance that that surplus has accrued from the act of the tenant; and that in consideration thereof they may deduct from the sum which would have been the fair rent, had the improvement been made by the landlord, such sum as they may think fit, in addition to the allowance which they make under sub-section 9.

We come now to the Act of 1896. That Act does not purport to affect the jurisdiction of the Land Commission, or, in reference to the matter in hand here, make any alteration in the elements to be taken into consideration by it, or in the law which, so far as that matter is involved, regulates the amount of fair rents. It defines, and to some extent it alters, the mode of procedure. It prescribes the ascertainment of certain factors. To use an arithmetical phrase, the Act of 1881 required the result only to be stated; the Act of 1896 requires part of the working of the sum to be also recorded. There is nothing in this Act inconsistent with the view we have stated: as is apparent from the language of sect. 1. That section directs the Court to ascertain, *inter alia*, "the improvements made wholly or partly by the tenant, or at his cost; and with respect to each such improvement—1, the nature, character, and present capital value thereof, and the *increased letting value due thereto*; 2, the date (so near as can be ascertained) at which the same was made; and, 3, the deduction from the rent made on account *thereof*," *i.e.* of the improvements. It is impossible to read a section which directs both the capital value and the amount of the increased letting value due to the improvements to be ascertained, before estimating the deduction to be made in favour of the tenant on account thereof, as confining the factors of that deduction to the capital value.

The remaining question brings in the element that the holding is subject to the Ulster Tenant-right Custom. As to this, the case states, "We were further of opinion, and so stated, that the

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fact that the holding was subject to the Ulster Tenant-right Custom did not alter the rights of the parties." The particular usage to which this holding is subject is not stated; but we understand from the judgment of Mr. Justice Meredith that no evidence was offered that that usage in any way provided for the mode in which the increased letting value caused by the tenant's improvements should be dealt with as between landlord and tenant; and accordingly, if the case is to be read as asking our opinion as to the effect of the Ulster Tenant-right Custom upon this particular holding, we agree in the view of the Land Commission that that custom does not, in this particular case, alter the rights of the parties. To prevent, however, misapprehension, we desire to say that if the case is to be read as laying down the general principle that no usage within the Ulster Tenant-right Custom can affect the apportionment, as between landlord and tenant, of the increased letting value due to the tenant's improvements, we should be unable to hold that such a principle was sustainable in point of law. As, however, we treat the case as not having raised the general question, we do not further refer to it.

HOLMES, L.J.:—

The question of law with which this case is conversant relates to the respective rights of the landlord and tenant in the increased letting value of the holding arising from the reclamation by the tenant of certain portions thereof. The greatest care has been taken in the preparation of the case to indicate the precise matter in controversy upon which the opinion of this Court is required. For this purpose there is first given a condensed report of the arguments of counsel on both sides. This is followed by a statement of the principles which, in the opinion of the Land Commission, are applicable in fixing a fair rent to the increased letting value arising from reclamation. The result is then given of the application of the principles thus formulated to the holding under consideration; and the case concludes with the question whether "the principles laid down and the mode of dealing with the same" are correct in point of law.

All the foregoing matters are set forth in language so clear and definite as to make misapprehension impossible; and, per-

haps, the most convincing testimony to the success with which a difficult task has been performed is, that the opposing litigants are in complete agreement as to the construction of the case and as to the precise point raised by it for decision.

In stating, in my own language, what I conceive this point to be, I am assisted by referring to the 1st section of the Land Law (Ireland) Act, 1896. It is therein provided that where the Court fixes a fair rent for a holding, the Court shall ascertain and record the annual sum which should be the fair rent on the assumption that all improvements thereon were made or acquired by the landlord. There is no ambiguity in this enactment, and for my present purpose comment on it is unnecessary. It is also provided that the Court shall ascertain and record the improvements made, wholly or partly, by the tenant or at his cost; and with respect to each such improvement—

(i.) the nature, character, and present capital value thereof, and the increased letting value due thereto;

(ii.) the date (so near as can be ascertained) at which the same was made; and

(iii.) the deduction from the rent, made on account thereof.

It appears to me that the question before us arises in reference to (i.) and (iii.).

How is the capital value—how is the deduction referred to in these provisions to be ascertained?

Those are the matters that lie at the root of the controversy, and they are first dealt with by Mr. Justice Meredith in his reported judgment (1) on the assumption that the holding was not subject to the Ulster Custom, or at least irrespective of such custom. He then considers whether the conclusion thus arrived at ought to be altered or modified by the admission of the landlord that the holding is subject to the custom.

I propose to adopt the same order of consideration. Although in the portion of the 1st section of the Act of 1896, to which I have referred, the words "present capital value" of the improvements is placed in juxtaposition to the "increased letting value due

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thereto," the contrast itself shows that the first-mentioned expression does not mean the increased letting value capitalized. One part of the tenant's argument seemed to place this construction on it : but the effect of adopting it would be to give a wholly erroneous meaning to the term " improvements." If there was one thing determined in *Adams* v. *Dunseath* (1) more clearly than all others, it was, that in the Act of 1881, as well as in the Act of 1870, the word " improvements " must be interpreted as meaning suitable and ameliorative works executed upon the holding. This is certainly not altered by anything in the Act of 1896; and, therefore, what is to be ascertained is the present capital value of a suitable and ameliorative work.

The increased letting value due to it is so far material that unless it exists there can be no improvement. It may also afford important evidence of the skill with which the work was carried out ; but there is nothing of which I am aware in the Land Law Code that makes the present capital value of an improvement to depend upon increased letting value in any other way. Therefore the present capital value in this provision can only mean the present value of an improvement work; in other words, the present value of the money, labour, and skill expended in making it.

I now come to the " deduction from the rent made on account of the improvement." This, of course, means the deduction from the annual sum previously ascertained as the fair rent of the holding on the assumption that all improvements thereon were made or acquired by the landlord.

Section 8, sub-section 9 of the Act of 1881 directed that no rent should be allowed or made payable in respect of improvements made by the tenant for which he has not been paid or otherwise compensated; and therefore there must be deducted from the fair rent ascertained upon the aforesaid assumption so much as will give the tenant the benefit of this provision. How then is this to be ascertained? Is it not by giving the tenant a return by way of annual allowance on the present capital value

(1) 10 L. R. Ir. 109.

of his improvements, such present capital value being calculated in the manner already pointed out. The case describes it as a fair or even a liberal return. I think that the adjective "liberal" is not quite appropriate as applied to the adjustment of legal rights. When used by a lawyer to lawyers, it is not likely to mislead; but bearing in mind that the duty of fixing the amount is performed by a tribunal partly composed of laymen, I prefer the word "reasonable." The important point, however, is that it is a return for the present capital value of the money, labour, and skill expended in carrying out the improvement works.

The case, as I understand it, states that in the opinion of the Land Commission the return ought to be strictly limited and confined to this. The tenant's counsel contend that it should go farther, that if the increased letting value due to the improvements exceeds a fair and reasonable return on the present value of the improvement works, the tenant is entitled to either the whole or part of the surplus. Now, if this claim of the tenant is conceded, he is clearly having his rent reduced by reason of something inherent in the character and capabilities of the land. The success of an ameliorative work depends upon two things:

(i.) The money, labour, and skill expended, and

(ii.) The latent capacity of the soil that is stimulated and brought into action by such expenditure.

When the expenditure has been incurred by the tenant, the Land Law Code gives the capital value thereof to him; it is an interest in the holding that is his, and no rent is to be made payable in respect of it. But the Land Law Code has given him no other or greater interest in the capacity of the soil operated on by the expenditure than he had in such capacity when it was latent, or than he would have had if the ameliorative work had been carried out by the landlord. Therefore, unless the tenant can show that he has such an interest in the holding generally, apart from the mere improvement work, as would entitle him to be relieved in some degree from rent in respect thereof, his claim to share in the increased letting value due to the improvements must fail. It would probably for the purposes of the present case be enough for me to say that if such interest exists, it must have been taken into account in arriving at the first figure, the

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annual sum which should be the fair rent of the holding, on the assumption that all improvements thereon had been made or acquired by the landlord: and that having been so taken into account, the tenant ought not to have credit for it again. But if I were to determine the case on this ground, I should be leaving the matter on which the decision of the Court is required still in doubt; and this would not only be unfair to the present litigants, but would also open the way to further difficulties.

The point at which I have arrived is in truth a branch of what Mr. Justice Meredith has called "the problem of occupation interest"—a matter which cannot be passed over, but which will be dealt with more appropriately after I have referred to the authority on which reliance has been placed on both sides.

The philosophical student of humanity, especially if he be somewhat cynical, cannot fail to find much to interest him in the historic case of *Adams* v. *Dunseath* (1). No legal controversy in my time excited so much contemporaneous interest; and certainly no modern lawsuit has attracted so much subsequent attention. It has been discussed without knowledge and criticised without responsibility. A judicial pronouncement on complicated legal questions is generally only known to experts; but all landlords and tenants feel themselves competent to express an opinion on *Adams* v. *Dunseath* (1).

The consequence is that the most widely divergent views have arisen in reference to it. It is said by some to have gone far to destroy the value to tenants of the Land Act of 1881, while others assert that it has not affected one way or other the amount of a single fair rent subsequently fixed. I need hardly say that I accept neither of these views. The first is so grossly extravagant as to be absurd; and the second takes no account of the important principles laid down in it which have since been acted on. As the decision was not wholly in favour of either landlord or tenant, neither class derived exclusive benefit from it; but both classes have had their rights and liabilities defined by it in important respects.

(1) 10 L. R. Ir. 109.

Amongst other things, it has settled, I think, the matter now in controversy up to a certain point. In reading the report of the case, one thing is to be observed. While the 2nd, 3rd, 4th, and 5th questions formulated and answered by the Court embody in a somewhat different but more convenient shape, the requisitions of counsel and the matters submitted by the Land Commission for decision, the first question deals with a subject which does not appear to have arisen or been discussed at the hearing.

The reason of this is that there was nothing at that stage of the case to suggest it as a point of controversy. The parties had not seen the official valuer's report. Judgment was not given till long afterwards; and the experts who were examined on both sides dealt with the improvements, as they had been in the habit of dealing with them when compensation was claimed under the Act of 1870. They gave the then capital value of what had been expended; and little or no attention was paid to the increased letting value due thereto, probably because no one thought that would have materially affected the result. It was only when the judgments were read some time after they were delivered that it was found that two of the three Commissioners had adopted a view of the interest of the tenant in improvements, which had not been contemplated or discussed at the hearing. That this view had not affected the amount of the fair rent is shown by the circumstance that after the case was remitted from the Court of Appeal, it was only altered by the addition of £2 in respect of a house upon which no rent had been previously placed.

I presume, therefore, that the first question was a well-intended effort to correct a serious error in principle which, although immaterial in that particular case, might be the source of future injustice. I need hardly say that the answer given to it by the Court is binding on all Irish tribunals; and that everything said by individual Judges, if only in the nature of *obiter dicta*, is deserving of the most careful consideration.

The first question and answer go a certain distance towards ruling the present case. All the Judges held that "improvements" in the Act of 1881 means works which, being suitable to the holding, add to its letting value, as distinguished from the increased letting value itself; and that it is only in respect of

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such works that the tenant is relieved from rent by section 8, sub-section 9, of the Act of 1881. The deduction made by the Land Commission in the present case must be assumed to be a fair and reasonable return for the capital value of those works; and therefore the tenant is not entitled to anything more under the sub-section aforesaid. Three at least of the Judges, however, intimated that there may be a further question, namely, whether when the tenant has received the benefit of this sub-section he is not also entitled to share with the landlord in the increased letting value due to the improvements. This was then left undetermined, and is now to be decided. I have already given my reason for holding that this point seems to me to involve the same question as arises in reference to the interest of the tenant in the holding generally. I think that this was the view of Sir Edward Sullivan, when he says, that after assessing a fair yearly allowance for the tenant's expenditure, the annual increased letting value that would remain after this is deducted should be dealt with by the Commissioners under the early part of the 8th section of the Act of 1881, with due regard to the interest of the landlord and tenant respectively. I think that it is also what Fitz Gibbon, L. J., refers to when he says:—"I do not desire to prejudge the question which is not now before us, but may hereafter arise; whether the tenant under the Acts of 1870 and 1881 has not an interest in his holding over and above his statutory tenure and his rights to compensation."

This was not involved in any of the questions answered by the Court; and I cannot regard it as decided one way or other in that case. Meredith, J., is of opinion that as far as the Land Commission is concerned the matter is closed by the series of cases that decided that no allowance or deduction in respect of occupation interest can be made from what would otherwise be the fair rent. I agree with him in this. I am prepared to adopt what he said in *Ripley* v. *Macnaghten* (1), recently before this Court (2), "that no such deduction can be made, whether it be conscious or unconscious, disclosed or undisclosed." My reasons can be stated in a few words. When the Act of 1881 provided that in fixing a fair rent,

(1) [1899] 2 Ir. R. p. 449. (2) *Blair* v. *Lord Gosford, ibid.*, 453.

the Court is to have regard to the interests of the landlord and tenant respectively, the Legislature referred to some interest known and legally recognised. It did not leave it to the discretion of the Land Commission to call into existence new interests. Before the Land Act of 1870, a yearly tenant could be dispossessed at any time by notice to quit; and as the consequence of quitting the holding was that he left behind without compensation all his expenditure upon it, and the *premium affectionis* that attached to it, such an uncertain tenure had no pecuniary value. The Act of 1870 entitled him to receive compensation for his improvement works on leaving, whether he left voluntarily or involuntarily. It thus conferred on him an interest in the holding which he had not before; and the Act of 1881, recognising this, gave the tenant the benefit of it in the manner already pointed out. But I know of no other interest conferred on him by either statute that can be had regard to in fixing a fair rent. The compensation for disturbance provided in the Act of 1870 only arose when the landlord evicted him capriciously; and ought not to be taken into account when fixity of tenure is secured to him. The idea of occupation interest originated apparently in a confused idea that this fixity of tenure is in itself a valuable interest. So it is, but it is not an interest for which the landlord ought to compensate the tenant: formerly the tenant paid the landlord by a fine or higher rent for a long term. Now the tenant is given a perpetual term without payment; but the fair rent of the holding, if it is not to be increased, is certainly not to be diminished on this account.

Since the argument our attention has been directed to the words "considering all the circumstances of the case, holding, and district" which follow in the 8th section of the Act of 1881, the words "having regard to the interest of the landlord and tenant respectively"; and it has been suggested that the fact that the tenant had carried out a highly beneficial work on the lands is in itself a circumstance that may entitle him to share in the increased letting value due thereto. This view was certainly not referred to in the discussion before us, or, as far as I am aware, in the Land Commission Court; and, as I have said on former occasions, I have always a difficulty in deciding a case upon a point that

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has not been argued. After the best consideration I have been able to give, it seems to me that if the construction referred to is given to the sentence, it has the effect of enabling the Land Commission by the exercise of a purely discretionary power to confer at the expense of the landlord an interest or at least an advantage on the tenant which he is not entitled to under his contract and which is not given him by the Legislature. The words in question I think merely amount to a direction that all circumstances legitimately relevant to the determining of a fair rent are to be considered, and are nothing more than the expressions of a well-recognised rule for judicial guidance, which in their absence would have been implied.

Thus far I have considered the subject irrespective of the fact that the holding is subject to the Ulster Custom; and the result is that I have arrived at the same conclusion as the Land Commission. Ought this conclusion to be affected by the landlord's admission as to the Ulster Custom? His counsel have given several reasons for answering this question in the negative; but I confine myself to one. No evidence was given as to the particular form of the custom applicable to this holding; and the admission was general in its terms. Therefore, unless the Ulster Custom of which a Court of Law takes judicial notice, necessarily includes as one of its incidents, a right on the part of the tenant to have his fair rent fixed on a principle different from that which would apply in the absence of the custom, the landlord's admission would be immaterial. I understand the Land Commission to have decided that the Ulster Custom does not of legal necessity include this incident, and that therefore in the case before the Court its existence did not affect the rights of the parties. In this I agree. The Ulster Custom was often judicially considered between the years 1870 and 1881. Lawyers then found it to be much more hazy and nebulous than legislators had supposed. Its essential characteristic—the only one of which I am at liberty to take judicial notice—is that the tenant on quitting or being evicted from his holding is entitled, subject to restrictions, limitations, and conditions which vary infinitely, to sell to another the right to succeed him as tenant. There are or were (when sales under the custom were common) rules and

usages for the purpose of keeping down the price and reducing competition; and partly on this account and partly by reason of inexplicable variations in the amount paid, it was difficult to ascertain what the purchase-money represented in any particular instance. Rents in tenant-right districts were revised as frequently, if not more frequently than elsewhere; but I am unable to say, either judicially or otherwise, on what principle they were revised. It is not unlikely, however, that as the custom varied so much in other respects, it also varied in this. Meredith, J., said in his judgment, "Serjeant Dodd suggested that there were some estates in Ulster upon which the custom obtained of exempting from rent the entire of the increased letting value. We have never had proof of any such incident of the custom." I presume that the judicial Commissioner was speaking not only for himself but also for his colleagues who have been administering the Land Acts for years; and my own more limited experience corresponds with theirs. But Mr. Justice Meredith speaks of it as a matter of proof; and I infer that the conclusion he would arrive at would in each case depend upon the evidence offered therein.

In *The Queen* (*Lord Gosford*) v. *The Irish Land Commission* (1), the schedule prepared under the first section of the Act of 1896 set forth as one of the circumstances taken into account in fixing the fair rent the fact that the holding was subject to the Ulster Custom, but did not state that the amount thereof was thereby affected. I held in that case that the finding as to the existence of the Ulster Custom was immaterial as far as the fair rent was concerned, and that, therefore, the reference to it, although out of place and irrelevant, did not make the order void or illegal. I spoke then as I do now of the general Ulster Custom, of which I have judicial notice, and did not mean to convey that proof might not be given that some of the many usages prevalent under that name have the incident attached to them suggested by Serjeant Dodd.

As far as I can see there is no difference in this part of the case between the Land Commission and this Court.

The result then is that I concur with the Land Commission in holding that the only deduction or allowance to which the tenant

(1) [1899] 2 I. R. 399.

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is entitled is a fair and reasonable return for the present capital value of the money, labour and skill expended by him in carrying out the reclamation, that in calculating such return the increased letting value is not to be taken into account, except for the purpose of seeing that it is an improvement, or as evidence of the skill employed, and that subject to such deduction or allowance the landlord is entitled to a fair rent for the holding, including therein the increased letting value due to the improvement works. This, I think, is saying in other words that the tenant, having received the full benefit of the provision that exempts his improvements from rent, is to derive no further advantage from such improvements in the determining of the rent. I intimated at the beginning of these observations that I saw no ambiguity in the question submitted to the Court, taken in connexion with the rest of the case. I think that both the principles laid down and the mode of dealing with them are clearly stated. Certain explanatory figures are set forth, but with these this Court has no concern. It is our duty to examine whether the deduction made from the rent on account of improvements is ascertained upon right principles; but the Land Commission alone is given jurisdiction to fix its amount by the application of those principles, and it is quite immaterial whether it is called an annual allowance or "a just and liberal return," to use the words of Fitz Gibbon, L.J., in *Adams* v. *Dunseath* (2), or "a fair percentage," to quote Sir E. Sullivan in the same case.

Taking the view, I do, I am in a position to give an unconditional and unqualified answer in the affirmative to the question submitted to the Court.

It is not for me to say to what extent I am thus differing from the joint judgment of the majority read by the Lord Chief Baron. Others can judge of this if they so desire, but whether the difference be great or little is a matter of purely speculative interest, as the guide for the Land Commission will be for the future the joint judgment.

SIR PETER O'BRIEN, L.C.J.:—

The answer to the question asked by the special case will be framed in the following manner:—

(1) 10 L. R. Ir. 109.

The Court is of opinion and doth declare—

1. That in fixing the fair rent of the holding the tenant was entitled in respect of the present capital value of his improvement works to such return, by way of annual allowance, as the Land Commission should determine to be fair, and sufficient to satisfy the provisions of the Land Law (Ireland) Act, 1881, section 8, sub-sect. 9.

2. That if the allowance so made was measured by way of percentage, merely upon the present capital value of the tenant's improvement works, or of his expenditure in moneys numbered, labour, and skill, and if, after the allowance so made, any surplus or balance of increased letting value due to his improvements remained, the Land Commission was bound to have regard, in dealing with such surplus or balance, to the matters hereinafter mentioned.

3. That in fixing the fair rent of the holding, and in dealing with the surplus or balance aforesaid, the Land Commission was bound to have regard to the interest of the landlord and tenant respectively, and to consider all the circumstances of the case, holding, and district, including the amount of such surplus or balance, and the sources from which the same was derived, treating the latent or dormant resources of the soil, as let by the landlord to the tenant, as the property of the landlord, and treating the development of those resources by the improvement as the act of the tenant.

4. That it was within the exclusive jurisdiction of the Land Commission, having due regard to the foregoing principles, to consider and determine whether, and in what proportions, the said surplus or balance should be divided between the landlord and the tenant in fixing the fair rent of the holding.

Accordingly the Court doth answer the question upon the special case in the negative.

Solicitor for the tenant: *J. K. Currie.*
Solicitor for the landlord: *Caruth.*

G. Y. D.